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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORMAN W. SWANSON, *et al.*,
Class A Petitioners,

and

CHARLES L. BERRY, *et al.*,
Class B Petitioners,

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989) should be applied retroactively to require refunds to Class A federal retirees of state income taxes unconstitutionally imposed and collected on their federal pensions for the tax years 1985-1988?

2. Whether North Carolina income taxes imposed and collected on the pay of Class B Petitioners, federal active duty and reserve military personnel, for the tax years 1986-1989, while granting a $1,500.00 income tax exemption on the pay of National Guardsmen is discriminatory, unconstitutional, a violation of 4 U.S.C. § 111 and contrary to this Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), thus requiring the State of North Carolina to grant refunds to Class B members?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of North Carolina were: Class A Petitioners, 394 federal pensioners who paid state income taxes on their federal pensions and Class B Petitioners, seven active duty and reserve military personnel, who paid State income taxes on their federal or military pay, on behalf of themselves and all others similarly situated; the Respondents, State of North Carolina, Helen A. Powers, individually and as Secretary of the North Carolina Department of Revenue, the North Carolina Department of Revenue and Harlan Boyles, Treasurer of the State of North Carolina. (A list of all named Petitioners and Respondents appears in App. H.)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THIS COURT'S DECISIONS IN *DAVIS v. MICHIGAN DEPT. OF TREASURY*, 489 U.S. 803 (1989) SHOULD BE APPLIED RETROACTIVELY TO REQUIRE REFUNDS TO CLASS A FEDERAL RETIREES OF STATE INCOME TAXES UNCONSTITUTIONALLY IMPOSED AND COLLECTED UPON THEIR FEDERAL PENSIONS FOR TAX YEARS 1985-1988	7
A. The Supreme Court of North Carolina Misapplied This Court's Decisions In *Beam v. Georgia* and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco of Florida* and Erroneously Concluded That *Davis v. Michigan* Should Not Be Applied Retroactively	7
B. A Writ Of Certiorari Should Be Granted To Provide Equal Protection To Petitioners As The Court Has Already Granted Writs of Certiorari In Virtually Identical Cases	14

TABLE OF CONTENTS—Continued

Page

C. North Carolina Has Already Applied *Davis v. Michigan* Retroactively To Certain Taxpayers And Should Not Be Allowed To Arbitrarily Discriminate Among Taxpayers When An Unconstitutional Tax Has Been Imposed And Collected In Violation Of 4 U.S.C. 111 and This Court's Opinion In *Davis v. Michigan* 15

D. The Writ Of Certiorari Should Be Granted To Insure That Petitioners Receive Meaningful Backward Looking Relief 16

II. NORTH CAROLINA INCOME TAXES IMPOSED UPON THE PAY OF CLASS B PETITIONERS, FEDERAL ACTIVE DUTY AND RESERVE MILITARY PERSONNEL, FOR TAX YEARS 1986-1989 WHILE GRANTING A $1,500.00 INCOME TAX EXEMPTION ON THE PAY OF NATIONAL GUARDSMEN IS DISCRIMINATORY, UNCONSTITUTIONAL, A VIOLATION OF 4 U.S.C. § 111 AND CONTRARY TO THIS COURT'S DECISION IN *DAVIS v. MICHIGAN DEPARTMENT OF TREASURY* THUS REQUIRING NORTH CAROLINA TO GRANT REFUNDS 18

CONCLUSION 20

APPENDIX A 1a

APPENDIX B 14a

APPENDIX C 31a

APPENDIX D 33a

APPENDIX E 48a

APPENDIX F 53a

APPENDIX G 55a

APPENDIX H 67a

TABLE OF AUTHORITIES

CASES: Page

Ashland Oil, Inc. v. Caryl, 110 S.Ct. 3202 (1990) .. 11
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 8
Bailey v. State, 330 N.C. 227, 410 S.E.2d 462 (N.C. 1991) 5
Bass v. South Carolina, 1992 WL 13852 (S.C. 1992) 9, 10
Bass v. South Carolina, 111 S.Ct. 2881 (1991) 6, 9, 14
Bridges v. City of Charlotte, 221 N.C. 472, 20 S.E.2d 825 (1942) 11
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 6, 11, 12
Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) ..... *passim*
Harper v. Virginia Dept. of Taxation, 111 S.Ct. 2883 (1991) 6, 9, 14
Harper v. Virginia Dept. of Taxation, 242 Va. 322, 410 S.E.2d 629, *petition for certiorari pending*, S.Ct. Dkt. No. 91-794 (1991) 9
James B. Beam Distilling Company v. Georgia, 501 U.S. ——, 111 S.Ct. 2439 (1991) ..... *passim*
Lewy v. Virginia Dept. of Taxation, 111 S.Ct. 2881 (1991) 9, 14
McKesson Corp. v. Division of Alcoholic Beverages & Tobacco of Florida, 496 U.S. 18 (1990) 16
Perpich v. Dept. of Defense, 110 S.Ct. 2418 (1990) 18
Sheehy v. Department of Revenue, 820 P.2d 1257 (S.Ct. Mont. Nov. 14, 1991) 17
Swanson v. Powers, No. 89-282-CIV-5H (E.D.N.C. 1990), *rev'd in part*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 116 L.Ed.2d 777 (13 January 1992) 4
Swanson v. Powers, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 116 L.Ed.2d 777 (13 January 1992) 7, 17
Swanson v. State, 329 N.C. 576, 407 S.E.2d 791, *reh. gr.*, 330 N.C. 445, *adhered to on reh.*, 330 N.C. 390, 410 S.E.2d 490 (1991) 1, 2, 6

TABLE OF AUTHORITIES—Continued

STATUTES:	Page
4 U.S.C. § 111	2, 4, 17, 18, 19, 20
28 U.S.C. § 1257	2
28 U.S.C. § 1341	16
42 U.S.C. § 1983	2, 17
N.C. Gen. Stat. § 105-134.6(b) (4) (*repealed*)	4, 18
N.C. Gen. Stat. § 105-163.23	11
N.C. Gen. Stat. § 105-266.1	5
N.C. Gen. Stat. § 105-267	5, 16
N.C. Gen. Stat. § 127A-3	18
1990 N.C. Sess. Laws, Ch. 1002	3, 4, 18, 19
OTHER AUTHORITIES:	
Supreme Court Rule 13	2
U.S. CONSTITUTION:	
Article VI, 2	2
Amend. XIV § 1	2

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norman W. Swanson and 393 other named Class A federal pensioners and 7 named Class B federal active duty and reserve military personnel who were plaintiffs below, on their own behalf and on behalf of all others similarly situated in Classes A and B, as certified by the trial court, hereby petition this Court for writ of certiorari to the Supreme Court of North Carolina.

OPINIONS BELOW

The trial court's opinion is unpublished and appears at Appendix E. The original opinion in the Supreme Court of North Carolina is reported at 329 N.C. 576, 407 S.E.2d 791 (1991) and appears at Appendix B. The opinion

on rehearing is reported at 330 N.C. 390, 410 S.E.2d 490 (1991) and appears at Appendix A.

JURISDICTION

The Supreme Court of North Carolina issued its opinion reversing the trial court's judgment for Petitioners on 14 August 1991. App. B. Petitioners timely petitioned for rehearing, which petition was granted on 5 December 1991, and the original opinion was affirmed 6 December 1991. App. A. This petition is, accordingly, filed within the time allowed by law. Supreme Court Rule 13. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, article VI, cl. 2 provides in relevant part:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

The Due Process Clause of the United States Constitution, Amendment XIV, § 1, provides in relevant part:

> . . . [n]or shall any State deprive any person of life, liberty, or property, without due proces of law . . .

4 U.S.C. § 111 provides in relevant part (emphasis added):

> The United States consents to the taxation of pay or *compensation* for personal services as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or *compensation*.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

1990 N.C. Session Laws, Chapter 1002 provides:

> SENATE BILL 1084
>
> AN ACT TO CONFORM THE LAWS OF NORTH CAROLINA TO THE REQUIREMENTS OF CERTAIN FEDERAL LAWS AND CONSTITUTIONAL PRINCIPLES.
>
> The General Assembly of North Carolina enacts:
>
> Section 1. G.S. 105-115 is repealed.
>
> Section 2. G.S. 105-134.6(b)(4) is repealed.
>
> Section 3. This act is effective for taxable years beginning on or after January 1, 1990.
>
> In the General Assembly read three times and ratified this the 20th day of July, 1990.

STATEMENT OF THE CASE

Certified Class A Petitioners are United States governmental retirees who receive federal pensions. Certified Class B Petitioners are reserve and active duty military personnel employed by the United States who receive federal pay. Both classes were subject to discriminatory North Carolina income taxation of their pensions or pay, respectively, before the decision of this Court on 28 March 1989 in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). The discriminatory scheme in North Carolina as to Class A, dating from 1941, was virtually identical to that Michigan scheme held uncon-

stitutional in *Davis*. The discrimination against Class B arose because National Guardsmen had a statutory state income tax exemption pursuant to former N.C. Gen. Stat. § 105-134.6(b)(4) of $1,500 of their pay, which exemption was not afforded to military reserve and active duty federal military personnel. Such discrimination continued by statute as to Class B after the *Davis* decision, through the calendar year 1989. The *Davis* decision applied the constitutional principle of intergovernmental immunity and 4 U.S.C. § 111 to specifically hold that states cannot tax more heavily the pensions of federal retirees than the pensions of state retirees.

After the *Davis* decision was announced, and after litigation commenced, the North Carolina General Assembly on 12 August 1989 abolished the discriminatory taxing scheme as to Class A Petitioners retroactively to 1 January 1989 by repealing the income tax exemption previously in effect for State and local government pensioners. The North Carolina General Assembly, after the Class B litigation commenced, repealed that discriminatory exemption for National Guardsmen retroactively to 1 January 1990. 1990 N.C. Sess. Law, Ch. 1002. While this Court's opinion in *Davis* did not deal specifically with the type of discrimination suffered by Class B, Petitioners contend, the trial court found, and the Supreme Court of North Carolina did not specifically disagree, that this discrimination is also barred by 4 U.S.C. 111 and the *Davis* ruling.

Following the *Davis* decision, Class A Petitioners brought a civil action in the U.S. District Court for the Eastern District of North Carolina, seeking, *inter alia*, damages under 42 U.S.C. 1983. *Swanson v. Powers, No. 89-282-CIV-5-H, (E.D.N.C. 1990), rev'd in part*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 116 L.Ed.2d 777 (13 January 1992). Class B Petitioners were later joined as additional plaintiffs. The District Court Judge issued an order certifying the original class (now Class A in the

federal action and the instant action) for the purpose of "giving any notice to the North Carolina Department of Revenue that may be required to obtain income tax refunds and required by G.S. 105 of the North Carolina General Statutes." App. F at 53a-54a. Notices or demands for refunds were given pursuant to that order and in accordance with N.C. Gen. Stat. 105-266.1 and § 105-267.[1] No refunds to Class A Petitioners were made.

Thereafter, Class A and Class B Petitioners brought this civil class action in the North Carolina Superior Court for refund of the taxes paid during 1985-1988 for Class A and 1986-1989 for Class B. The trial court certified the classes (these classes being identical with those in the federal action) for the purpose of making statutory refund demands for Class A and Class B (and by Class A again), which class demands were made. The trial court entered judgment for Petitioners and those similarly situated ordering refunds and interest thereon. App. E at 51a. Respondents appealed and the Supreme Court of North Carolina reversed in a 4-3 decision holding that the *Davis* decision should only be given prospective effect. That court then remanded to the trial court for dismissal of the entire action. Petitioners obtained a rehearing (though no rehearing or additional briefing actually was

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[1] Sec. 105-266.1 provides for (1) a taxpayer refund demand to be made within three years after the return due date, (2) an administrative hearing thereon, and (3) a suit for refund following denial. N.C. Gen. Stat. § 105-266.1 (1989). Sec. 105-267 provides for a taxpayer refund demand to be made within 30 days after the tax is paid (whatever that means in the context of an income tax), if refund is not forthcoming within 90 days after the demand a suit for refund can be filed within three years. N.C. Gen. Stat. § 105-267 (1989). The Supreme Court of North Carolina has construed § 105-267 alone to apply to unconstitutional taxes. *Bailey v. State*, 330 N.C. 277, 410 S.E.2d 462 (1991). Petitioners successfully argued in the trial court for a three year limitation period that was tolled by the class claim for refund. The Supreme Court of North Carolina did not reverse that determination.

ordered). App. D at 33a-47a and App. C at 31a. On rehearing, the court dismissed state law claims that were not addressed in the previous opinion, and reaffirmed the original opinion. 330 N.C. 390, 410 S.E.2d 490 (1991); App. B at 14a-30a. These state claims had not been ruled on by the trial court and were not argued or briefed by any party in the Supreme Court of North Carolina for the reason that the same were not properly before that Court.

Petitioners' alleged in their Amended Complaint that the discriminatory taxation of both Class A and Class B Petitioners violated the federal constitution. Respondents never contested the unconstitutionality of the tax imposed on Class A Petitioners. Petitioners asserted, both at trial and at the appellate level, that Class B Petitioners were unconstitutionally taxed. The Supreme Court of North Carolina did not specifically discuss the post-*Davis* discrimination against Class B, but reversed the trial court judgment granting Class B relief, even for 1989 taxes. The Supreme Court of North Carolina's reversal was based on this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and the State Supreme Court's conclusion that *Davis* only be applied prospectively, notwithstanding this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ——, 111 S.Ct. 2439 (1991) and the vacation and remand of the state supreme court's decisions in *Harper v. Virginia Dept. of Taxation*, 111 S.Ct. 2883 (1991) and *Bass v. South Carolina*, 111 S.Ct. 2881 (1991).

The companion federal action proceeded to a final certification of the classes (which was never contested) and an order by the trial judge which: (1) denied motions to dismiss under the Tax Injunction Act and comity, (2) granted a motion to dismiss any claims against the State for damages but not for injunctive and declaratory relief, and (3) denied the motion to dismiss the action as to the Secretary of Revenue individually on the grounds of qualified immunity. App. G at 66a. Respondents appealed

only the qualified immunity issue and the Fourth Circuit reversed and this Court denied certiorari. *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991); *cert. denied*, 116 L.Ed.2d 777 (13 January 1992).

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DECISION IN *DAVIS v. MICHIGAN DEPT. OF TREASURY*, 489 U.S. 803 (1989) SHOULD BE APPLIED RETROACTIVELY TO REQUIRE REFUNDS TO CLASS A FEDERAL RETIREES OF STATE INCOME TAXES UNCONSTITUTIONALLY IMPOSED AND COLLECTED ON THEIR FEDERAL PENSIONS FOR TAX YEARS 1985-1988.

A. The Supreme Court of North Carolina Misconstrued This Court's Decisions in *Beam v. Georgia*, and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco of Florida* and Erroneously Concluded That *Davis v. Michigan* Should Not Be Applied Retroactively.

While the majority of the Supreme Court of North Carolina noted at page 12 of its original opinion that Michigan conceded retroactivity, it overlooks the fact that this Court in *Davis* did not rely solely on Michigan's concession in determining that Mr. Davis was entitled to a refund. This Court wrote that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund. *See Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 247, 52 S.Ct. 133, 136, 76 L.Ed. 265 (1931)." *Davis v. Michigan Department of Treasury*, 489 U.S. at 817. In the *Iowa-Des Moines Bank* case, this Court ordered refund of unconstitutionally collected taxes. The citation and usage of *Iowa-Des Moines Bank* in *Davis* by this Court in ordering tax refunds was not a mere gratuity. In an analogous situation, this Court held that a prior decision of this Court would apply retroactively. *James B. Beam Distilling Company v. Georgia*, 501 U.S. ——, 111 S.Ct. 2439 (1991). That decision mandated

retroactive application of an earlier state tax decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

The *Beam* decision was decided prior to the original decision of the Supreme Court of North Carolina in the instant case. *Beam* was a 6 to 3 decision of this Court with several opinions. Justice Souter wrote the plurality opinion of the Court in which Justice Stevens joined. Justice Souter's opinion construed the *Bacchus* decision as having retroactively applied the rule there decided, and in part for that reason, held that the same rule also must be applied retroactively in *Beam*.

In the original opinion of the Supreme Court of North Carolina, the majority's application of *Chevron* hinges on distinguishing *Beam* from *Davis* on the ground that in *Davis* the question of retroactivity was not considered. App. B at 23a. The majority of the Supreme Court of North Carolina failed to recognize that in *Bacchus*, the Commerce Clause case on which the *Beam* litigant depended—analogous to *Davis*, the intergovernmental tax immunity case on which the *Swanson* litigants depend—the question of retroactivity was similarly not directly at issue. *Beam*, 111 S.Ct. at pp. 2445, 2448 and 2451. The question is not, as the Supreme Court of North Carolina concluded, whether *Beam* is analogous to *Davis*, but whether *Bacchus* is analogous to *Davis*.

It is apparent that this is the proper analogy from the *Beam* opinion itself in which Justice Souter made specific reference to *Davis*: "Because the Court in *Bacchus* remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided . . . *Cf. Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 817." *Id.* at 2445-46. Justice Souter in *Beam* read *Bacchus* as having followed the normal rule of retroactivity, thus requiring retroactivity for *Beam Distilling Company* and noted that "any consideration of remedial issues necessarily implies

that the precedential question has been settled to the effect that the rule of law will apply to the parties before the Court." *Id.* at 2445. Further, Justice White wrote in his concurring opinion that even if *Bacchus* was wrongfully applied retroactively to the litigants there, "that is water over the dam, irretrievably it seems to me. There being no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated, and *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987), having overruled such a practice in criminal cases . . . I agree that the petitioner here should have the benefit of *Bacchus*, just as Bacchus Imports, Ltd. did." *Id.* at 2448-49.

It was indicated a second time a week later by this Court that the *Davis* Rule was to be applied retroactively when writs of certiorari were granted and judgments vacated and remanded for further consideration in light of *Beam* in *Harper v. Virginia Dept. of Taxation*, 111 S.Ct. 2883 (1991), in *Lewy v. Virginia Dept. of Taxation*, 111 S.Ct. 2881 (1991) and in *Bass v. South Carolina*, 111 S.Ct. 2881 (1991). Each of these cases involved claims essentially identical to those of Class A Petitioners in the instant case.

The Virginia and South Carolina supreme courts originally dismissed the federal retirees' refund actions on the ground that *Davis* was not to be applied retroactively. The Virginia and South Carolina Supreme Courts now have reconsidered their decisions on remand and declined again to apply *Davis* retroactively. *Harper v. Virginia Dept. of Taxation*, 242 Va. 322, 410 S.E.2d 269 (1991), *petition for certiorari pending*. S. Ct. Dkt. No. 91-794; *Bass v. South Carolina*, 1992 WL 13852 (S.C. 1992). The opinions of the Virginia and South Carolina Supreme Courts on remand cited and relied in part on the original opinion of the Supreme Court of North Carolina that is the subject of this Petition. *Harper v. Virginia Dept. of Taxation*, 242 Va. 322, 324, 410 S.E.2d 629, 631 (1991)

and 1992 WL 13852 at p. 6.[2] The instant case is the first state supreme court decision after *Beam* to consider *Beam* and to rule that *Davis* should be applied only prospectively. Applied to Petitioners' claims here, *Beam* requires refunds because the question is simply whether *Davis* was applied retroactively—that is, whether Mr. Paul Davis received the benefit of the decision in that case. *Beam*, 111 S. Ct. at 2446. He did. The very question presented in *Davis* was whether Mr. Davis' federal pension was legally taxable under the Michigan Income Tax Law. This Court held that it was not. *Davis*, 489 U.S. at 806-07, 817. Thus, all similarly situated taxpayers must, as did Mr. Davis, receive the benefit of the *Davis* decision based on principles of equality and *stare decisis*. *Beam*, 111 S. Ct. at 2446.

The rational of *Beam* is also applicable here in view of the fact that the State of North Carolina granted refunds to a small percentage of federal pensioner taxpayers, thus extending the *Davis* rule retroactively to at least those claimants, although for only a one-year recovery period. Such differential treatment of similarly situated claimants is the precise harm that *Beam* prohibits. Accordingly, principles of equality and fairness require that where some North Carolina federal pensioners have received the retroactive benefit of *Davis* from Respondents themselves, then all similarly situated taxpayers are likewise entitled to the same treatment. Aside from the principles of plain, basic fairness, any other conclusion results in judicial approval of arbitrary and capricious classification by state government against a large segment of North Carolina's elderly taxpaying citizens and contrary to their rights of equal protection under the law.[3]

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[2] The *Harper* and *Bass* decisions in the state supreme courts also rested on alternative state law grounds that are not present in the instant case.

[3] *See* Section I C, *infra*. In addition to the argument that the majority of the North Carolina Court wrongly applied the rationale

As Justice Souter's opinion in *Beam* and as the remands of the Virginia and South Carolina *Davis*-type cases suggested, *Davis* should not be limited to prospective application because *Davis* was "clearly foreshadowed" by earlier decisions of this Court. See *Ashland Oil, Inc. v. Caryl*, 110 S.Ct. 3202 (1990).

After the Supreme Court of North Carolina held *Beam* to be inapplicable, it proceeded to apply the three pronged test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Even if that test is still applicable, it was incorrectly applied. The Supreme Court of North Carolina, in applying *Chevron*, took notice of the State's then current budget problems as the basis for finding it inequitable to grant refunds. App. B at 22a-23a. The Court said that repeal of the discrimination provided satisfactory relief and that refunds would be "inequitable." App. B at 23a. The correct view of *Chevron* and *Beam* was articulated below by the three dissenting members of the Supreme Court of North Carolina in that court's original decision.

> Assuming *arguendo* that the *Chevron* test is still valid, three factors must be considered in determining

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of *Beam*, Petitioners contend that the majority also misapplied *Chevron*. The majority opinion overlooks the facts that Revenue officials knew for years of the discriminatory treatment, (App. G at 65a-66a), that it has been well settled in North Carolina for at least a half-century that retirement benefits constitute deferred compensation, (*Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942)) and that the Secretary of Revenue received withholdings on federal retirement benefits pursuant to a State statute authorizing income tax withholdings from "wages" of federal employees. N.C. Gen. Stat. § 105-163.23 (1989); and App. G at 65a-66a. *Chevron*, thus, cannot be applicable as *Davis* was not necessary in North Carolina to make these constitutional violations apparent. In fact, it is undisputed that Defendant Revenue officials were in possession of a detailed treatment of *Davis* as early as July 1988 and by 11 January 1989, of a North Carolina State Legislative Tax Fairness Report characterizing the State's taxing scheme to be discriminatory. (App. G at 65a.) Notwithstanding this, the Revenue Department incredibly stated it had "no position" on pre-*Davis* proposed corrective tax fairness legislation.

whether a constitutional ruling by the Supreme Court of the United States in a civil case will be applied retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 30 L.Ed.2d 296, 306 (1971). In the present case, all of those factors weigh in favor of retroactive application of *Davis*.

The first factor to be considered under *Chevron* is whether the decision to be applied has established "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . ." *Id.* at 106, 30 L.E.2d at 306. Clearly, the Supreme Court's decision in *Davis* did not overrule any past precedent. Further, the majority in *Davis* seems to have felt that its holding there—that imposing state taxes upon the pensions of federal retirees but not upon the pensions of similarly situated state retireees was unconstitutional—had been clearly foreshadowed under the constitutional doctrine of intergovernmental tax immunity. *See Davis*, 489 U.S. 803, 103 L.Ed.2d 891.

The second factor under *Chevron* requires a consideration of the prior history of the rule announced by the Supreme Court, its purpose and effect, and whether retroactive application will further or retard the operation of the rule. *Chevron*, 404 U.S. 106-107, 30 L.Ed.2d 306. Unlike my colleagues, I believe that retroactive application of the rule announced in *Davis* will further the operation of that rule. Surely, requiring the State to return money it has collected from one class of taxpayers in a discriminatory and unconstitutional manner will further the operation of the rule announced in *Davis* declaring that the very conduct engaged in by the State violates the Constitution of the United States.

The third and final factor to be considered under *Chevron* is whether retroactive application of the Supreme Court decision in question will produce "inequitable results." *Id.* at 107, 30 L.Ed.2d at 306. As to this factor, my colleagues take judicial notice

of the fact that the State of North Carolina is currently experiencing hard financial times. For that reason, they conclude that it would be "inequitable" to require the State to refund the taxes it has unconstitutionally taken from the plaintiffs under the color of state law.

I am unable to see the "inequity" involved in requiring the State to return any money it has unconstitutionally taken from the plaintiffs. In my view, the fact that the State is experiencing financial difficulties has little to do with whether it would be inequitable to require the State to refund the plaintiffs' money. Nothing in the record before us indicates that the plaintiffs, federal pensioners and military personnel, are experiencing any less financial difficulties than the State of North Carolina. Further, unlike the State, the plaintiffs do not have the power of taxation at their disposal when attempting to deal with their financial difficulties. There simply is nothing "inequitable" or wrong about ordering that the State not pick a taxpayer's pocket or in requiring it to return the money when it is caught doing so. I believe it is entirely equitable and just to apply the rule announced in *Davis* retroactively so as to require that the State return any taxes it has unconstitutionally collected from the plaintiffs.

For the foregoing reasons, I believe that all three factors to be considered under the *Chevron* test weigh heavily in favor of the plaintiffs and against the defendants. Therefore, if the *Chevron* test is still valid, *Davis* must be applied retroactively.

I note, however, that the continuing viability of the *Chevron* test has been brought into question by the decision of the Supreme Court of the United States in *James B. Beam Co. v. Georgia*, —— U.S. ——, —— L.Ed.2d— (1991). Nevertheless, I am convinced that, even if the *Chevron* test has been abandoned, the rule announced in *Davis* must be given fully retroactive application for whichever of the

several reasons set forth by the various Justices in *Beam* ultimately prevails in the Supreme Court of the United States. *See generally, Beam, id.*

App. B at 28a-30a. Furthermore, North Carolina pre-*Davis* case law made *Chevron* inapplicable because *Davis* did not articulate a new rule of law in North Carolina.[4]

The scope of the remedial application of the *Davis* decision, in light of *Beam* and other recent decisions of this Court as cited herein, is a matter of great significance in multiple cases, not only to the plaintiffs and states involved, but also to the jurisprudence on this issue, and should be resolved by this Court.

B. The Writ of Certiorari Is Necessary In This Case To Provide Equal Protection To Petitioners As The Court Has Already Granted Writs of Certiorari In Virtually Identical Cases.

In granting certiorari in *Harper v. Virginia Department of Taxation*, 111 S.Ct. 2883 (1991), *Lewy v. Virginia Department of Taxation*, 111 S.Ct. 2881 (1991) and *Bass v. South Carolina*, 111 S.Ct. 2881 (1991), this Court has indicated that it deems the prospectivity or retroactivity of the *Davis* decision to be of sufficient concern to warrant granting of the writ of certiorari here. The second petition for certiorari in *Harper* is before this Court and was considered by the Court on 17 January 1992. S. Ct. Dkt. No. 91-794. No decision was announced. Petitioners request that either the writ be granted to Petitioners herein or at least held pending a final pronouncement by this Court regarding the retroactivity of *Davis*.

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[4] *Supra*, note 3.

C. North Carolina Has Already Applied *Davis* v. *Michigan* Retroactively To Certain Taxpayers And Should Not Be Allowed To Arbitrarily Discriminate Among Taxpayers When An Unconstitutional Tax Has Been Imposed and Collected In Violation Of 4 U.S.C. 111 and This Court's Opinion In *Davis* v. *Michigan*.

As heretofore mentioned, there is an additional reason under *Davis* and *Beam* why this Court should review the decision of the North Carolina Supreme Court. Approximately 12,404 of the approximately 90,000 members of Class A received refunds of their 1988 North Carolina income taxes totalling almost ten million dollars. App. B at 26a.

These refunds were made because of the State's administrative decision to recognize the retroactive effect of *Davis* for a limited group of individuals who were able to satisfy a purported 30-day statute of limitations for tax refunds, and make individual demands for refund pursuant to N.C. Gen. Stat. § 105-267. Respondents attempted to apply the same 30-day limitations period to Petitioners here, but the trial court applied a three year limitations period. Conversely, the State asserted and the Supreme Court of North Carolina held that the *Davis* decision applied only prospectively in the context of this class action.

This Court should grant the writ of certiorari because the retroactivity of *Davis* is an issue the importance of which this Court already has recognized which should be decided in this, the first post-*Beam* decision in a *Davis*-type case, and because Respondents have applied the *Davis* rule retroactively to some individuals similarly situated to Petitioners. North Carolina should not be allowed to arbitrarily treat identically situated taxpayers differently in derogation of their federal constitutional rights.

D. The Writ of Certiorari Should Be Granted To Insure That Petitioners Receive Meaningful Backward Looking Relief.

State taxpayers in North Carolina, such as Petitioners, do not have any prepayment remedy against state taxes that violate the federal constitution. State statutes (here, N.C. Gen. Stat. § 105-267) and the federal Johnson Act (28 U.S.C. § 1341) forbid prepayment injunction of state taxes. Therefore, state taxpayers must pay those taxes under threat of possible interest, penalties and criminal prosecution. *See generally*, N.C. Gen. Stat. Chapter 105.

"[M]eaningful backward looking relief" is required by the Due Process Clause of the Constitution when no prepayment remedy is provided by the State. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco of Florida*, 496 U.S. 18 (1990). This requirement means that *Davis* must be applied retroactively in North Carolina, as no prepayment remedy is provided by State law. Nevertheless, the Supreme Court of North Carolina by applying *Davis* prospectively only, effectively denied refund relief, illustrating the parochialism of state courts and the need for the writ of certiorari from this Court.

The highest court in North Carolina attempted to protect the State's treasury at the expense of federal constitutional rights. The original opinion of the Supreme Court of North Carolina in seeking to apply *Chevron* in the instant case boldly stated:

> ". . . we can take judicial notice of the fact that this State is in dire financial straits. The refund of taxes, as asked by the plaintiffs, will cost the State approximately $140,000,000.00. This would require a further increase in taxes or a further cut in services by the state."

App. B at 22a-23a.

A recent observation by a Montana Supreme Court justice in a *Davis* related case succinctly states what Peti-

tioners contend occurred in the instant case: "The majority's decision is clearly a result-oriented decision arrived at for the purpose of protecting the state's coffers." *Sheehy v. Department of Revenue*, 820 P.2d 1257, 1269 (S.Ct. Mont. Nov. 14, 1991). The lack of a plain, efficient and speedy remedy, or any remedy for that matter, for those who paid unconstitutional taxes is further demonstrated by the fact that Petitioners here attempted unsuccessfully to obtain a relief in federal court by obtaining a personal judgment against the Secretary of Revenue under 42 U.S.C. § 1983. App. G at 64a-66a. The action was based on the fact that the Secretary of Revenue had collected the illegal taxes in violation of the constitutional principle of intergovernmental immunity and 4 U.S.C. § 111, and furthermore had violated Petitioners' due process rights by impeding their claims for refund. The State argued that the Secretary was just following the law as written. The federal district judge determined that the Secretary's action made the State remedy ineffective, in the context of his Johnson Act decision. App. G at 65a-66a. The personal liability portion of that action was dismissed by the Fourth Circuit Court of Appeals, however, which reversed the trial court decision that the Secretary was not protected by the doctrine of qualified immunity. *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 116 L.Ed.2d 777 (January 13, 1992).

Therefore, given the inability to obtain prepayment relief and to proceed directly against state revenue officials who collect unconstitutional taxes, it is particularly important in this case that this Court grant the writ of certiorari to protect the Petitioners rights as guaranteed by the United States Constitution and federal statutes.

II. NORTH CAROLINA INCOME TAXES IMPOSED UPON THE PAY OF CLASS B PETITIONERS, FEDERAL ACTIVE DUTY AND RESERVE MILITARY PERSONNEL, FOR TAX YEARS 1986-1989 WHILE GRANTING A $1,500.00 INCOME TAX EXEMPTION ON THE PAY OF NATIONAL GUARDSMEN IS DISCRIMINATORY, UNCONSTITUTIONAL, A VIOLATION OF 4 U.S.C. § 111 AND CONTRARY TO THIS COURT'S DECISION IN *DAVIS v. MICHIGAN DEPARTMENT OF TREASURY*, THUS REQUIRING NORTH CAROLINA TO GRANT REFUNDS.

North Carolina provided a $1,500 income tax exemption for State National Guard pay from 1979 through 1989. N.C. Gen. Stat. § 105-134.6(b)(4) (repealed). No similar exemption was provided for Class B Petitioners. This clearly is a violation of 4 U.S.C. 111 and the principles applied in *Davis* as the North Carolina National Guard is clearly a component of state government. N.C. Gen. Stat. § 127A-3. *Perpich v. Dept. of Defense*, 110 S.Ct. 2418 (1990). As the court below recognized, Class B Petitioners, as employees of the federal government, received less favorable tax treatment than members of the North Carolina National Guard. Nevertheless, the decision below not only reversed the trial court as to pre-*Davis* refunds for Class B, but inexplicably, without comment, allowed the discrimination to continue after *Davis* throughout 1989.

Even under the majority opinion of the Supreme Court of North Carolina and of its own statement of the facts and application of *Chevron*, *Chevron* only prevents retroactive relief for taxes imposed *prior to* the *Davis* decision. Clearly, taxes were imposed and collected from Class B Petitioners for the 1989 tax year (due 15 April 1990) *after* the *Davis* decision. The discriminatory taxing scheme imposed against them was not even repealed until 20 July 1990 after the instant action was filed on behalf of Class B Petitioners. *See*, 1990 N.C. Sess. Laws, Ch.

1002, entitled "*An Act To Conform The Laws Of North Carolina To The Requirements Of Certain Federal Laws And Constitutional Principles.*" [5] Petitioners contend the foregoing reasons are fully sufficient to justify granting of the writ. The Supreme Court of North Carolina erroneously reversed the trial court solely on the basis of *Chevron* and this alone should be the basis of grant of the writ of certiorari.

Significantly, the Class B discrimination both after and before *Davis* violates the express wording of 4 U.S.C. 111. This discrimination has been acknowledged by the North Carolina Legislature. 1900 N.C. Sess. Laws, Ch. 1002. A federal court order has also recognized the discrimination: "This statute provides no remedy to the Class B Plaintiffs." App. G at 62a.

Thus, *Chevron* cannot be applicable to bar refunds to Class B and certainly not as to the 1989 taxes collected as late as 15 April 1990. The North Carolina treatment of Class B after *Davis* by continuing to collect unconstitutional taxes throughout 1989 (due 15 April 1990) and refusing refunds, plainly evidences state governmental disregard for taxpayer's basic constitutional rights. The Supreme Court of North Carolina refused to deal with these continuing violations, though these were specifically called to its attention. App. D at 38a-39a.

The State trial court's judgment was correct as to the rights of Class B Petitioners and the State Supreme Court

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[5] No refund remedy except that ordered by the trial court below has been provided to Class B Petitioners. Respondents' failure to take any remedial steps regarding Class B Petitioners for illegal taxes imposed after *Davis* plainly evidences governmental disregard for taxpayers' rights. This is, unfortunately, the type of bureaucratic irresponsibility that necessitates judicial intervention. Petitioners urge this Court not to condone or ignore Respondents' conduct. This Court must reject official action which is so fundamentally contrary to principles of honorable and responsible governmental taxation of individual citizens.

decision requires reversal, pursuant to 4 U.S.C. 111 and this Court's decisions. This Court should grant the writ of certiorari and reverse the Supreme Court of North Carolina and grant full refunds to Class B Petitioners.

CONCLUSION

For over four decades, millions of dollars have been unconstitutionally collected by North Carolina in direct violation of 4 U.S.C. 111 and the constitutional doctrine of intergovernmental immunity. The North Carolina trial court recognized this flagrant abuse and ordered the State to refund unconstitutionally collected taxes for four years to Class A Petitioners and unconstitutionally collected taxes to Class B Petitioners for four years. The Supreme Court of North Carolina misapplied this Court's decisions to erroneously conclude that *Davis* should not be applied retroactively. In addition, the State of North Carolina arbitrarily discriminated between taxpayers by awarding some taxpayers one-year refunds but denying any meaningful backward relief to Petitioners here. Finally, North Carolina's collection of blatantly unconstitutional taxes from Class B Petitioners for a full year after this Court's decision in *Davis* was announced, and refusing to grant any refunds demonstrates North Carolina's total disregard for Class B Petitioners' federal constitutional rights. Petitioners respectfully request, therefore, that this Court grant the writ of certiorari to the Supreme Court of North Carolina to prevent the State of North Carolina callously disregarding constitutional decisions of this Court and continuing to violate Petitioners federal constitutional rights.

Respectfully submitted,

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March 4, 1992

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

No. 64PA91—Wake

NORMAN W. SWANSON, HENRY F. MURRAY, CARL L. WHITNEY, WILLIAM E. NICHOLSON, III, CHARLES A. DANCY, MELVIN F. EYERMAN, IRA N. SCHWARZ, JOHN L. POWELL, JR., GALINA ELWORTH, DONALD V. WALLACE, WILLIAM E. DENTON, ROBERT A. NISBET, WALTER J. BARTNIKOWSKI, RALPH P. HUNT, MARION B. ZOLLICOFFER, WILLIAM H. TALBERT, BILLY CLARK, WALLACE M. DAVIS, GRADY L. STRANGE, HAMILTON M. HOWE, MARY L. PRITCHARD, ROBERT B. CAMPBELL, BROWNING ADAMS, PRITCHARD G. ADAMS, WILLIAM H. ADAMS, EDWARD H. and FLOSSIE P. ALLEN, JOSEPH A. ALLEN, RACHEL C. ALLRED, HELEN L. and LEO I. ANCTIL, RONALD E. ANDERSON, CLARENCE P. ARMSTRONG, CARROLL W. AUSTIN, F.L. AUSTIN, JR., DONALD P. BAHR, PAUL BALLUS, CHARLES D. BARKER, SR., WALTER E. BARKHOUSE, EDWARD C. BARRET, JAMES L. BAXTER, RUSSELL W. BEARD, BERNARD L. BEATTY, RICHARD K. BELL, LEO E. BENADE, SHERMAN W. BETTS, JOSEPH H. BETZ, ROBERT L. BLEVINS, FRANKLIN M. BLUNT, TIMOTHY C. BOLICK, MARGARET C. BOONE, HENRY A. BOTKIN, ALEX BOURDAS, OLA MAY (TATE) BOVENDER, EUGENE A. BOWEN, LAVAUNE K. BREDA, MARLOWE G. BREDA, TROND G. BREKKE, LAURA B. BRENDLE, MILLARD BRIDGERS, CLARENCE M. BRIDGES, DORIS K. BRIDGES, CYRUS H. BROOKS, JR., DANIEL R. BROWN, K.A. BROWN, WILLIAM D. BROWN, BETTY P. BULLOCK, ROBERT S. BULLOCK, FINDLEY BURNS, JR., RAY G. BURRELL, RICHARD E. BUSH, JAMES M. BYRNE, NORMAN L. CARLTON, MATTHEW E. CARMEAN, FRANK CATES, J. CRAWFORD CATON, HARRY

E. CHAMBERLAIN, VINCENT H. CHASE, PAUL F. CHAVEZ, WOODROW H. CHILDRESS, JOHN G. CHURCH, HERMAN L. CLANTON, ROBERT L. CLARKE, CHARLES C. CLAUSEN, SR., DENNIS E. CLECKNER, STEVE P. CLEMENIC, LACY W. COATES, RUCIA A. COBB, JAMES A. CODDINGTON, CATHERYN S. COLEY, LAURA K. CONDER, JAMES C. CONINE, MARSHALL G. COOPER, ASBURY COWARD, III, NEWTON P. COX, RUTH A. COX, BURNETTE E. CREASMAN, THOMAS J. CULKIN, HAZEL B. CURLEE, MILTON L. DAIL, BEATRICE G. DAVIS, BERNLEY S. DAVIS, DONALD M. DAVIS, ESSIE M. DAVIS, GEORGE E. DAVIS, ROBERT J. DAVIS, CLIFFORD H. DAWSON, CALVIN F. DEAN, ORIEN G. DEAN, JR., JACK M. DEATON, VIOLET B. DEITMARING, ARLEN J. DEVITO, JOHN E. DEVLYN, SARA E. DEVLYN, JOY E. DICKINSON, MRS. LEROY B. DICKINSON, JAMES E. DIFFEE, DELBERT R. DILLON, MARGARET H. DOPF, RAYMOND E. DOPF, LEROY M. DUFFY, CHARLES F. DUPONT, BOBBY R. EASON, DAVID EDMISTEN, CARL L. EFFLER, JOHN H. ELDER, JR., JOHN R. ELLIS, MANFORD G. FARR, RITA FESTO, JOHN J. FILAN, ANGELO A. FLORENTINO, ROBERT W. FOLDEN, OSCAR F. FOWLER, MELVIN W. FRITZ, WALTON E. FULCHER, ROBERT C. FULLER, WALTER E. FULLER, FRANK W. FURCHES, NORMAN CARL GADDIS, MARSHALL L. GADDY, THOMAS B. GARDINER, ROBERT F. GEISSLER, WILLIAM E. GENTNER, JR., THOMAS P. GINN, ROBERT W. GOODMAN, JOHN R. GORDON, BERNICE C. GRANDY, JR., STEVEN W. GRANDY, ROBERT J. GREEN, MICHAEL R. GREESON, JAMES H. GRIFFIN, THOMAS M. GROOME, JR., JAMES W. GROSS, ARTHUR S. GUNDERSON, HERT L. HANCOCK, JR., JAMES M. HARDIN, C. LEE HARRIS, HOWARD W. HARRIS, PAUL H. HARVEY, ROLAND R. HATCHER, HENRY S. HEFFLEY, JR., CARROLL A. HEFNER, CLARENCE J. HENSLEY, JR., RICHARD M. HERIOT, DORIS T. and NOVIS S. HERRING, VIRGINIA R. HILDEBRAND, MOZELLE L. HINSHAW, HERMAN J. HIPPS, RUFUS M. HODGIN, DONALD R. HOFFMAN, CHARLES K. HOFFMEYER, MARY R. HOLLAND, EDGAR P. HOLT, RAY

HOMESLEY, NED A. HOOD, ROBERT H. HOOD, STEPHEN W. HOPKINS, CLYDE L. HOWARD, JR., KEVIN G. HUGHES, HARVEY R. HURST, SAM P. HYATT, JOHN L. IRBY, MATTIE B. IVES, FRANCIS JACOBS, RICHARD L. JARRETT, JACQUELINE M. JENNINGS, WOODROW W. JONES, DONALD L. JORGENSON, KENNETH R. JOSEPH, PATSIE W. JOSEPH, EVERETTE R. KELLER, BERNARD J. KELLEY, WILSON P. KEMP, HOWARD LEE KERR, MARGARET C. KERR, WILLIAM S. KETNER, DAVID L.G. KING, THOMAS M. KING, JR., EVELYN W. KINNEY, JOHN E. KIRK, PAUL E. KIRKLAND, SR., RAYMOND B. KLEBER, GEORGE M. KNOBL, JR., WILLIAM F. KNOPF, MAX V. KREBS, WILLIAM J. KUHN, JR., JAMES M. LANGSTON, JR., JANE W. LANGSTON, ELMER L. LASHUA, JOHN L. LATHAM, DANIEL M. LAUDERBACK, AUGUST R. LAWRENCE, FREIDA H. and NORWOOD P. LEWIS, HENRY G. and DOROTHY J. LILES, WALTER E. LINTHICUM, PHYLLIS V. LIPPARD, GEORGE LOTT, ROBERT P. LUCAS, ALLEN M. MABE, THOMAS S. MACELUCH, WILLIAM F. MARCUSON, JR., WARNER G. MAUPIN, LYLTON E. MAXWELL, OLIVER A. MAYS, ANDREW G. MAYSE, SAMUEL S. MCCACHREN, ELIZABETH S. MCCASKILL, ELIZABETH G. MCDONALD, CLYDE W. MCKIRK, DONALD D. MCGUIRE, NORMAN H. MCLAUGHLIN, DOY K. MCPHAIL, WILLIAM RAY MEDLIN, JR., ERNEST E. MILLER, MARGARET H. MILLER, EDGAR N. MILLINGTON, HAROLD J. MITCHENER, EUGENE E. MOODY, DOROTHY C. MOORE, JAMES C. MOORE, JR., LUCIE E. MOORMAN, ROBERT M. MOOSE, JACK B. MORRIS, REGENA E. MORRISON, STANLEY B. MORSE, WOODFORD T. MOSELEY, GEOGRE R. MUSE, R.J. NETTLES, THOMAS G. NEWPORT, JOHN E. NITSCHE, ALFRED P. NORWOOD, JOHNNIE M. OCHOA, ELVIN E. OGLESBY, OLIVER G. OJA, RUSSELL E. OLSON, LLOYD A. OSBORNE, PAUL B. OSGOOD, WILLIAM C. PAGE, LEE R. PARAMORE, LEWIS W. PATE, CHARLES R. PATTON, VERNON J. PEEBLES, W.W. PEGUES, MARY E. and JOHN D. PENN, ELLIOTTE T. PERKINS, JR., WILLIAM H. PERRY, JR., PAUL J. PHILLIPPI, RICHARD L. PHILLIPS,

RUBY A. PHILLIPS, FRANK J. PIAZZA, SR., DALLAS PICKARD, JR., GEORGE A. PINTER, EDWARD W. PIPER, FREDERICK H. PLESS, R.F. HOKE POLLOCK, JR., LEWINGTON S. PONDER, ELBERT Y. POOLE, JENNETTE C. POOLE, MARTHA BOYCE POTEAT, EDWIN H. PRICE, CHARLES R. PUGH, DANIEL J. QUESENBERRY, MILTON H. QUINN, LOUISE M. RABBINO, THOMAS M. RAMSEY, JACK G. RAY, MARSHALL G. RAY, HAZEL S. REDMON, GEORGE R. REINHART, III, ANNIE E. RENKEL, MADGE O. REYNOLDS, FRANKLIN E. RICHARDSON, JR., ALLEN W. RIGSBY, GEORGE M. ROBERTS, JENNINGS B. ROBINSON, JAMES P. ROTH, PHIFER P. ROTHMAN, HAROLD E. RUBLE, HILDA H. RULTENBERG, DONALD E. RUSSELL, GEORGE W. SABO, LYLE E. SAMSON, ROBERT L. SCHEER, FREDERICK L. SCHUERMAN, SR., ROBERT J. SCHULLERY, ELWOOD M. SHAULIS, ROBERT T. SHERIDAN, STANLEY T. SHIPLEY, CHARLES B. SHIVELY, CHARLES A. and RUTH M. SHUE, JR., ELSIE N. and FREDERICK E. SIMMONS, MARY B. SIMPSON, MANUEL F. SIVERIO, JOSEPH A. SIZOO, EVELYN S. SMITH, GEORGE B. SMITH, JAMES A. SMITH, JAMES E. SMITH, JAMES P. SMITH, JOE F. SMITH, PERCY H. SMITH, JOSEPH L. SOMMER, RAY H. SPANGLER, JAMES A. SPRANKLE, WILEY L. STANDIFER, JR., JAMES W. STARBUCK, GERTRUDE D. STARLING, STACY J. STARLING, HENRY C. STEED, JR., ROY C. STEELEY, ARTHUR L. STEWART, BURLENA J. STEWART, JOHN R. STEWART, JR., GEORGE W. STILLWAY, RITA M. STILLWAY, HAROLD E. STONE, CLYDE DALTON STOWE, HARRY H. STRUNK, E.C. STUMPF, THOMAS A. SUMMEY, JR., ELLIS G. SUMNER, LEO B. and MILDRED Y. SUMNER, MARGARET K. SWINK, JAMES E. SYKES, OLIVER B. TALBERT, JAMES D. TERRELL, CLYDE E. and EMOGENE M. THOMPSON, FRED L. TRACY, ROCCO H. TROMBELLO, JOHN G. TRUITT, JR., WILLIAM H. TURK, JAMES T. VANCE, FRANCES A. VANDEN, GEORGE W. VANDEN, ETHEL D. VANHORN, EDWARD J. VAUGHN, EDWARD VENKLER, ROY L. VICK, SR., KERMIT J. VINSON, MYRTLE H. VINSON, WILLIAM E. WADE, FLOYD H.

WALDROP, WANDA E. WALLACE, RONALD J. WEBER, GRACE F. WEINER, LONA C. WEISNER, LAWRENCE O. WELCH, PAUL B. WELCH, JR., GEORGE L. WESTERLIND, WILLIAM B. WHITE, T.M. WHITTINGTON, JR., GEORGE W. WILKINS, ROBERT S. WILLIAMS, JR., WILLIAM C. WILLIAMS, WINTON H. WILLIAMS, HAROLD P. WILLIAMSON, EDNA MAE WILSON, ROBERT GRAVES WILSON, JR., ERNEST G. WINSTEAD, PETER S. WONDOLOWSKI, ROBERT V. WOOD, MAYNARD B. and EVELYN W. WOODBURY, JACK R. WORLEY, JOHN T. WORRELL, GEORGE T. WORRELL, GEORGE E. YALE, JR., and WILLIAM P. YARBOROUGH, individually for the benefit and on behalf of all other similarly situated,

Class A Plaintiffs,

CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER and PAUL H. TURNEY, individually and for the benefit and on behalf of all others similarly situated,

Class B Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Defendants

[Filed Dec. 6, 1991]

Hearing on order granting plaintiffs' motion to rehear the opinion rendered in this case at 329 N.C. 576, 407 S.E.2d 791 (1991).

CHARLES H. TAYLOR and WOMBLE, CARLYLE, SANDRIDGE & RICE, by G. EUGENE BOYCE, DONALD L. SMITH, JASPER L. CUMMINGS, JR., WALLACE R. YOUNG, JR., and MICHAEL J. NEWMAN, for plaintiff appellees.

LACY H. THORNBURG, Attorney General, by ANDREW A. VANORE, JR., Chief Deputy Attorney General, EDWIN M. SPEAS, JR., Senior Deputy Attorney General, THOMAS F. MOFFITT, Special Deputy Attorney General, MARILYN R. MUDGE, Assistant Attorney General, and DOUGLAS A. JOHNSTON, Assistant Attorney General, for the State appellant.

ROBINSON, BRADSHAW and HINSON, P.A., by JOHN R. WESTER and DAVID C. WRIGHT III, for defendant appellant Helen A. Powers.

WEBB, Justice.

We have granted the plaintiffs' petition for rehearing in order to answer some of the claims made by the plaintiffs in the petition. The plaintiffs say, in their petition for rehearing, that the matter passed on in superior court was a motion for partial summary judgment which dealt only with claims under the Constitution of the United States. They say that they have alleged claims under the Constitution of North Carolina which have not been determined in the superior court and ask that the case be remanded to determine those claims.

We hold that the order entered by the superior court from which the appeal was taken was not for partial summary judgment. It was entitled motion for partial summary judgment but the motion said:

> Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Plaintiffs move this Court to enter an order granting summary judgment in favor of Class A Plaintiffs on their claims for refunds of taxes unlawfully collected from them for tax years

> 1985 through 1988 and in favor of Class B Plaintiffs on their claims for refunds of taxes unlawfully collected from them for tax years 1986 through 1989.

Nowhere in this motion do the plaintiffs limit it to their claims under the United States Constitution. The order granting the motion is entitled "Partial Summary Judgment" but it does not limit the order to claims under the United States Constitution. After reciting that there is no genuine issue of a material fact and that the plaintiffs are entitled to judgment as a matter of law, the superior court ordered a refund of taxes to both classes of plaintiffs. If we were to say the order should be limited to either federal or state claims, there is no way of determining from the motion or the order to which type of claim it should be limited. We hold the superior court passed on all claims. The State in its brief argues all the claims.

Both classes of plaintiffs alleged that the collection of the taxes deprived them of due process and equal protection of the laws guaranteed them by N.C. Const. art. I, § 19, as well as the constitutional right to uniformity in taxation guaranteed to them by N.C. Const. art. V, § 2, and the right against the taxing of acts previously done guaranteed by N.C. Const. art. I, § 16.

In order to withstand a challenge to an act of the General Assembly on the ground it violates the law of the land clause of N.C. Const. art. I, § 19, which is comparable to the due process clause of the federal Constitution, the act of the General Assembly must have a rational relation to a valid state objective. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976). The provision of pensions for retired state employees and the payment to members of the National Guard are valid state objectives. The exemption from taxation for these two remunerations has a rational relation to each of them. The granting of these exemptions does not violate the law of the land clause of N.C. Const. art. I, § 19.

We are not certain that N.C. Const. art. V, § 2 has any application to this case. It deals principally with taxation of property. Its only reference to income taxes is contained in the following sentence, "[t]he rate of tax on incomes shall not in any case exceed ten percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed." N.C. Const. art. V, § 2(6).

Assuming N.C. Const. art. V, § 2 applies, we believe the resolution of whether it prohibits the tax on the plaintiffs in this case presents the same question as is presented by the equal protection clause of N.C. Const. art. I, § 19. The General Assembly created a class composed of retired state employees and a class composed of members of the National Guard. Each of these classes received favorable treatment under the income tax laws of this state. The question is whether these two classifications are reasonable and not arbitrary. Neither class of plaintiffs is a suspect class and the test as to arbitrariness is whether the distinctions drawn for retired state employees and members of the National Guard bear some relationship to a conceivable legitimate governmental interest. Texfi Industries v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980); Leonard v. Maxwell, Comr. of Revenue, 216 N.C. 89, 3 S.E.2d 316, *app. dismd.*, 308 U.S. 516, 84 L.Ed. 439 (1939). The providing of compensation for retired state employees and members of the National Guard is a legitimate governmental interest. The exemption of a part or all of this compensation from taxation has some relation to this governmental interest. These exemptions do not violate the equal protection clause of N.C. Const. art. I, § 19, or art. V, § 2.

The plaintiffs also contend that the tax imposed on them violates N.C. Const. art. I, § 16, which provides in part: "[n]o law taxing retrospectively . . . acts previously done shall be enacted." The taxes on the Class B plain-

tiffs were imposed on income in the years it was received. It was not imposed on acts previously done.

The taxes imposed on federal retirees were not taxes on acts previously done. The taxes were imposed on income which was received in the years the taxes were collected. The fact that the pensions of the federal retirees were based on wages previously earned does not make the tax retrospective. A statute is not unconstitutionally retretroactive merely because it operates on facts which were in existence before its enactment. *See* Smith v. American and Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982) and Wood v. Stevens and Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

With the addition of this opinion, we reaffirm the opintion previously entered. We reverse and remand to the Superior Court, Wake County for the entry of judgment dismissing the action.

REVERSED AND REMANDED.

Chief Justice EXUM dissenting.

I joined in Justice Mitchell's original dissenting opinion because I think, and continue to think, that Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 103 L. Ed. 2d 891 (1989), is retroactive and plaintiffs are entitled to its benefits. That was the only issue addressed by the majority in its original opinion.

On plaintiffs' petition for rehearing the majority has elected to address certain state constitutional issues which plaintiffs contend were never ruled on by the trial court. It is not clear from the record on appeal that the state constitutional issues were addressed and decided by the trial court. If the trial court determined the case solely on the basis of the retroactivity of *Davis*, its order would not necessarily have been written differently. The trial court would have necessarily considered the state constitutional claims only if it had rejected plaintiffs' federal law claims. It is clear that the state law claims were neither briefed nor argued by plaintiffs on the original appeal. Neither side addressed these points in its oral presentation to the Court. Under these circumstances I think it inappropriate for the Court to address them now on plaintiffs' petition for rehearing.

I would either remand the case for determination of the state constitutional questions as plaintiffs have prayed or order a reargument and new briefing on the state constitutional issues.

I take this opportunity also to say that I have real doubt as to whether plaintiffs have followed proper statutory procedures and it may be that, ultimately, their claims will be barred on procedural grounds. *See* Bailey v. State of North Carolina, —— N.C. ——, —— S.E.2d —— (No. 105PA91, filed 6 December 1991). Since the majority has not chosen to address this aspect of the case, I, too, will leave it for another day.

No. 105PA91—Wake

DWIGHT W. PADGETT, CALVIN C. PEARCE, WILLIAM W. PEEK, GEORGE W. PEELER, MICHAEL PELECH, JUANITA B. PENN, DIANE S. PEOPLES, CHARLES B. PIERCE, EVELYN D. PIERCE, SYLVIA S. PINYAN, MILDRED R. POINDEXTER, WINNIE D. POTTS, LEVI GLEN POWELL, THOMAS C. PRATT, CHARLES W. RANKIN, RALPH L. RAY, PATSY M. REYNOLDS, MATTIE B. RICHARD, ELNA C. ROSE, FRANCES T. SACRINTY, EDNA G. SCALES, MELVIN J. SCALES, VALDA E. SCHMITT, WORTH G. SEATS, CHARLES SELLE, NELSON L. SHEAROUSE, CONRAD H. SHELTON, MARY L. SHELTON, ELIZABETH H. SHERMER, BLANCHE S. SHIPP, RALPH N. SHUE, FRANCIS C. SIMMONS, JOE L. SIMMONS, HAROLD E. SIMPSON, RICHARD H. SIMPSON, REUBEN E. SLADE, GARNET N. SMART, LENORA S. SMITH, LONNIE H. SMITH, MATTIE S. SMITH, PAUL M. SMITH, FRANCES J. SNOW, EULALIA T. SOLOMON, G. VANCE SOLOMON, LUCILE J. SPEAS, DAVID W. SPIVEY, CHARLES A. SPEED, CAROLINE G. SPENCER, THOMAS S. THOMPSON, ELLA BELLE TILLMAN, DORIS E. TUCKER, JUSTUS M. TUCKER, RUTH L. TUCKER, MARGARET M. TUGMAN, FRANK L. UPRIGHT, WALTER P. UPRIGHT, ELIZABETH W. WACKERHAGEN, MARTHA M. WALKER, NORMAN W. WALKER, RALPH B. WALKER, ELIZABETH G. WALLS, JEAN A. WATSON, SAMUEL S. WHEELER, CORA M. WHITEHEAD, DANIEL W. WILLIAMS, ELIZA S. WILLIAMS, HARRY LEE WILLIAMS, ELIZABETH L. WILSON, MARIAN B. WILSON, WILBUR G. WILSON, HOYT A. WISEMAN, VIRGINIA A. WISEMAN, ERNEST B. WOOD, SR., HOWARD L. WOOTERS, THOMAS S. WORSHAM, JACK D. ZIMMERMAN, and KENNETH A. GRIFFIN, individually for the benefit and on behalf of all others similarly situated,

Petitioners-Plaintiffs,

v.

STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, HELEN A. POWERS Individu-

ally, BETSY JUSTUS in her capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER, HARLAN E. BOYLES Individually and in his capacity as TREASURER OF THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA FIREMEN'S AND RESCUE WORKER'S PENSION FUND, LEGISLATIVE RETIREMENT SYSTEM, NATIONAL GUARD RETIREMENT SYSTEM, RETIREMENT SYSTEMS FOR COUNTIES, CITIES, AND TOWNS, RETIREMENT SYSTEM FOR TEACHERS AND STATE EMPLOYEES, SUPPLEMENTAL RETIREMENT INCOME ACT OF 1984, SEPARATE INSURANCE BENEFIT PLANS FOR STATE AND LOCAL GOVERNMENTAL LAW ENFORCEMENT OFFICERS, SHERIFF'S SUPPLEMENTAL PENSION FUND OF 1985, ANNUITIES FOR STATE EMPLOYEES, REGISTER OF DEEDS SUPPLEMENTAL PENSION FUND, UNIFORM CONSOLIDATED JUDICIAL RETIREMENT SYSTEM, and PUBLIC EMPLOYEES BENEFITS SERVICES OF NORTH CAROLINA, FIREMAN'S SUPPLEMENTAL FUND (HICKORY), CHARLOTTE FIREFIGHTERS' RETIREMENT SYSTEM, OPTIONAL RETIREMENT PROGRAM FOR STATE INSTITUTIONS OF HIGHER EDUCATION,

Respondents-Defendants

On discretionary review prior to determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31 of an order of class certification entered on 31 December 1990 *nunc pro tunc* for 29 October 1990 and an order granting partial summary judgment for plaintiffs entered on 2 November 1990 by Lake, J., presiding at the 29 October 1990 session of Superior Court, Wake County. Heard in the Supreme Court 8 May 1991.

Justice MITCHELL dissenting.

For reasons fully explained in my dissent from the previous decision and opinion of the majority of this Court in this case, I continue to believe that Davis v. Michigan

Dept. of Treasury, 489 U.S. 803, 103 L. Ed. 2d 891 (1989) is fully retroactive and that the taxpayer-plaintiffs are entitled to its benefits. Swanson v. State of North Carolina, 329 N.C. 576, 586-89, 407 S.E.2d 791, 796-97 (1991) (Mitchell, J., dissenting, joined by Exum, C.J., and Frye, J.). For that reason, I continue to dissent from the result reached by the majority.

Justice FRYE joins in this dissenting opinion.

APPENDIX B

IN THE SUPREME COURT OF NORTH CAROLINA

No. 64PA91—Wake

NORMAN W. SWANSON, HENRY F. MURRAY, CARL L. WHITNEY, WILLIAM E. NICHOLSON, III, CHARLES A. DANCY, MELVIN F. EYERMAN, IRA N. SCHWARZ, JOHN L. POWELL, JR., GALINA ELWORTH, DONALD V. WALLACE, WILLIAM E. DENTON, ROBERT A. NISBET, WALTER J. BARTNIKOWSKI, RALPH P. HUNT, MARION B. ZOLLICOFFER, WILLIAM H. TALBERT, BILLY CLARK, WALLACE M. DAVIS, GRADY L. STRANGE, HAMILTON M. HOWE, MARY L. PRITCHARD, ROBERT B. CAMPBELL, BROWNING ADAMS, PRITCHARD G. ADAMS, WILLIAM H. ADAMS, EDWARD H. and FLOSSIE P. ALLEN, JOSEPH A. ALLEN, RACHEL C. ALLRED, HELEN L. and LEO I. ANCTIL, RONALD E. ANDERSON, CLARENCE P. ARMSTRONG, CARROLL W. AUSTIN, F.L. AUSTIN, JR., DONALD P. BAHR, PAUL BALLUS, CHARLES D. BARKER, SR., WALTER E. BARKHOUSE, EDWARD C. BARRET, JAMES L. BAXTER, RUSSELL W. BEARD, BERNARD L. BEATTY, RICHARD K. BELL, LEO E. BENADE, SHERMAN W. BETTS, JOSEPH H. BETZ, ROBERT L. BLEVINS, FRANKLIN M. BLUNT, TIMOTHY C. BOLICK, MARGARET C. BOONE, HENRY A. BOTKIN, ALEX BOURDAS, OLA MAY (TATE) BOVENDER, EUGENE A. BOWEN, LAVAUNE K. BREDA, MARLOWE G. BREDA, TROND G. BREKKE, LAURA B. BRENDLE, MILLARD BRIDGERS, CLARENCE M. BRIDGES, DORIS K. BRIDGES, CYRUS H. BROOKS, JR., DANIEL R. BROWN, K.A. BROWN, WILLIAM D. BROWN, BETTY P. BULLOCK, ROBERT S. BULLOCK, FINDLEY BURNS, JR., RAY G. BURRELL, RICHARD E. BUSH, JAMES M. BYRNE, NORMAN L. CARLTON, MATTHEW E. CARMEAN, FRANK CATES, J. CRAWFORD CATON, HARRY

E. CHAMBERLAIN, VINCENT H. CHASE, PAUL F. CHAVEZ, WOODROW H. CHILDRESS, JOHN G. CHURCH, HERMAN L. CLANTON, ROBERT L. CLARKE, CHARLES C. CLAUSEN, SR., DENNIS E. CLECKNER, STEVE P. CLEMENIC, LACY W. COATES, RUCIA A. COBB, JAMES A. CODDINGTON, CATHERYN S. COLEY, LAURA K. CONDER, JAMES C. CONINE, MARSHALL G. COOPER, ASBURY COWARD, III, NEWTON P. COX, RUTH A. COX, BURNETTE E. CREASMAN, THOMAS J. CULKIN, HAZEL B. CURLEE, MILTON L. DAIL, BEATRICE G. DAVIS, BERNLEY S. DAVIS, DONALD M. DAVIS, ESSIE M. DAVIS, GEORGE E. DAVIS, ROBERT J. DAVIS, CLIFFORD H. DAWSON, CALVIN F. DEAN, ORIEN G. DEAN, JR., JACK M. DEATON, VIOLET B. DEITMARING, ARLEN J. DEVITO, JOHN E. DEVLYN, SARA E. DEVLYN, JOY E. DICKINSON, MRS. LEROY B. DICKINSON, JAMES E. DIFFEE, DELBERT R. DILLON, MARGARET H. DOPF, RAYMOND E. DOPF, LEROY M. DUFFY, CHARLES F. DUPONT, BOBBY R. EASON, DAVID EDMISTEN, CARL L. EFFLER, JOHN H. ELDER, JR., JOHN R. ELLIS, MANFORD G. FARR, RITA FESTO, JOHN J. FILAN, ANGELO A. FLORENTINO, ROBERT W. FOLDEN, OSCAR F. FOWLER, MELVIN W. FRITZ, WALTON E. FULCHER, ROBERT C. FULLER, WALTER E. FULLER, FRANK W. FURCHES, NORMAN CARL GADDIS, MARSHALL L. GADDY, THOMAS B. GARDINER, ROBERT F. GEISSLER, WILLIAM E. GENTNER, JR., THOMAS P. GINN, ROBERT W. GOODMAN, JOHN R. GORDON, BERNICE C. GRANDY, JR., STEVEN W. GRANDY, ROBERT J. GREEN, MICHAEL R. GREESON, JAMES H. GRIFFIN, THOMAS M. GROOME, JR., JAMES W. GROSS, ARTHUR S. GUNDERSON, HERT L. HANCOCK, JR., JAMES M. HARDIN, C. LEE HARRIS, HOWARD W. HARRIS, PAUL H. HARVEY, ROLAND R. HATCHER, HENRY S. HEFFLEY, JR., CARROLL A. HEFNER, CLARENCE J. HENSLEY, JR., RICHARD M. HERIOT, DORIS T. and NOVIS S. HERRING, VIRGINIA R. HILDEBRAND, MOZELLE L. HINSHAW, HERMAN J. HIPPS, RUFUS M. HODGIN, DONALD R. HOFFMAN, CHARLES K. HOFFMEYER, MARY R. HOLLAND, EDGAR P. HOLT, RAY HOMESLEY,

NED A. HOOD, ROBERT H. HOOD, STEPHEN W. HOPKINS, CLYDE L. HOWARD, JR., KEVIN G. HUGHES, HARVEY R. HURST, SAM P. HYATT, JOHN L. IRBY, MATTIE B. IVES, FRANCIS JACOBS, RICHARD L. JARRETT, JACQUELINE M. JENNINGS, WOODROW W. JONES, DONALD L. JORGENSON, KENNETH R. JOSEPH, PATSIE W. JOSEPH, EVERETTE R. KELLER, BERNARD J. KELLEY, WILSON P. KEMP, HOWARD LEE KERR, MARGARET C. KERR, WILLIAM S. KETNER, DAVID L.G. KING, THOMAS M. KING, JR., EVELYN W. KINNEY, JOHN E. KIRK, PAUL E. KIRKLAND, SR., RAYMOND B. KLEBER, GEORGE M. KNOBL, JR., WILLIAM F. KNOPF, MAX V. KREBS, WILLIAM J. KUHN, JR., JAMES M. LANGSTON, JR., JANE W. LANGSTON, ELMER L. LASHUA, JOHN L. LATHAM, DANIEL M. LAUDERBACK, AUGUST R. LAWRENCE, FREIDA H. and NORWOOD P. LEWIS, HENRY G. and DOROTHY J. LILES, WALTER E. LINTHICUM, PHYLLIS V. LIPPARD, GEORGE LOTT, ROBERT P. LUCAS, ALLEN M. MABE, THOMAS S. MACELUCH, WILLIAM F. MARCUSON, JR., WARNER G. MAUPIN, LYLTON E. MAXWELL, OLIVER A. MAYS, ANDREW G. MAYSE, SAMUEL S. MCCACHREN, ELIZABETH S. MCCASKILL, ELIZABETH G. MCDONALD, CLYDE W. MCKIRK, DONALD D. MCGUIRE, NORMAN H. MCLAUGHLIN, DOY K. MCPHAIL, WILLIAM RAY MEDLIN, JR., ERNEST E. MILLER, MARGARET H. MILLER, EDGAR N. MILLINGTON, HAROLD J. MITCHENER, EUGENE E. MOODY, DOROTHY C. MOORE, JAMES C. MOORE, JR., LUCIE E. MOORMAN, ROBERT M. MOOSE, JACK B. MORRIS, REGENA E. MORRISON, STANLEY B. MORSE, WOODFORD T. MOSELEY, GEORGE R. MUSE, R.J. NETTLES, THOMAS G. NEWPORT, JOHN E. NITSCHE, ALFRED P. NORWOOD, JOHNNIE M. OCHOA, ELVIN E. OGLESBY, OLIVER G. OJA, RUSSELL E. OLSON, LLOYD A. OSBORNE, PAUL B. OSGOOD, WILLIAM C. PAGE, LEE R. PARAMORE, LEWIS W. PATE, CHARLES R. PATTON, VERNON J. PEEBLES, W.W. PEGUES, MARY E. and JOHN D. PENN, ELLIOTTE T. PERKINS, JR., WILLIAM H. PERRY, JR., PAUL J. PHILLIPPI, RICHARD L. PHILLIPS, RUBY A.

PHILLIPS, FRANK J. PIAZZA, SR., DALLAS PICKARD, JR., GEORGE A. PINTER, EDWARD W. PIPER, FREDERICK H. PLESS, R.F. HOKE POLLOCK, JR., LEWINGTON S. PONDER, ELBERT Y. POOLE, JENNETTE C. POOLE, MARTHA BOYCE POTEAT, EDWIN H. PRICE, CHARLES R. PUGH, DANIEL J. QUESENBERRY, MILTON H. QUINN, LOUISE M. RABBINO, THOMAS M. RAMSEY, JACK G. RAY, MARSHALL G. RAY, HAZEL S. REDMON, GEORGE R. REINHART, III, ANNIE E. RENKEL, MADGE O. REYNOLDS, FRANKLIN E. RICHARDSON, JR., ALLEN W. RIGSBY, GEORGE M. ROBERTS, JENNINGS B. ROBINSON, JAMES P. ROTH, PHIFER P. ROTHMAN, HAROLD E. RUBLE, HILDA H. RULTENBERG, DONALD E. RUSSELL, GEORGE W. SABO, LYLE E. SAMSON, ROBERT L. SCHEER, FREDERICK L. SCHUERMAN, SR., ROBERT J. SCHULLERY, ELWOOD M. SHAULIS, ROBERT T. SHERIDAN, STANLEY T. SHIPLEY, CHARLES B. SHIVELY, CHARLES A. and RUTH M. SHUE, JR., ELSIE N. and FREDERICK E. SIMMONS, MARY B. SIMPSON, MANUEL F. SIVERIO, JOSEPH A. SIZOO, EVELYN S. SMITH, GEORGE B. SMITH, JAMES A. SMITH, JAMES E. SMITH, JAMES P. SMITH, JOE F. SMITH, PERCY H. SMITH, JOSEPH L. SOMMER, RAY H. SPANGLER, JAMES A. SPRANKLE, WILEY L. STANDIFER, JR., JAMES W. STARBUCK, GERTRUDE D. STARLING, STACY J. STARLING, HENRY C. STEED, JR., ROY C. STEELEY, ARTHUR L. STEWART, BURLENA J. STEWART, JOHN R. STEWART, JR., GEORGE W. STILLWAY, RITA M. STILLWAY, HAROLD E. STONE, CLYDE DALTON STOWE, HARRY H. STRUNK, E.C. STUMPF, THOMAS A. SUMMEY, JR., ELLIS G. SUMNER, LEO B. and MILDRED Y. SUMNER, MARGARET K. SWINK, JAMES E. SYKES, OLIVER B. TALBERT, JAMES D. TERRELL, CLYDE E. and EMOGENE M. THOMPSON, FRED L. TRACY, ROCCO H. TROMBELLO, JOHN G. TRUITT, JR., WILLIAM H. TURK, JAMES T. VANCE, FRANCES A. VANDEN, GEORGE W. VANDEN, ETHEL D. VANHORN, EDWARD J. VAUGHN, EDWARD VENKLER, ROY L. VICK, SR., KERMIT J. VINSON, MYRTLE H. VINSON, WILLIAM E. WADE, FLOYD H. WALDROP, WANDA E. WALLACE,

ROLAND J. WEBER, GRACE F. WEINER, LONA C. WEISNER, LAWRENCE O. WELCH, PAUL B. WELCH, JR., GEORGE L. WESTERLIND, WILLIAM B. WHITE, T.M. WHITTINGTON, JR., GEORGE W. WILKINS, ROBERT S. WILLIAMS, JR., WILLIAM C. WILLIAMS, WINTON H. WILLIAMS, HAROLD P. WILLIAMSON, EDNA MAE WILSON, ROBERT GRAVES WILSON, JR., ERNEST G. WINSTEAD, PETER S. WONDOLOWSKI, ROBERT V. WOOD, MAYNARD B. and EVELYN W. WOODBURY, JACK R. WORLEY, JOHN T. WORRELL, GEORGE T. WORRELL, GEORGE E. YALE, JR., and WILLIAM P. YARBOROUGH, individually for the benefit and on behalf of all other similarly situated,

Class A Plaintiffs,

CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER and PAUL H. TURNEY, individually and for the benefit and on behalf of all others similarly situated,

Class B Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Defendants

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of orders entered by Currin, J., on 17 August 1990, 3 October 1990 and 31 December 1990 in Superior Court, Wake County. Heard in the Supreme Court 7 May 1991.

This is an action by the plaintiffs for the refund of certain taxes paid by them prior to the decision of the United States Supreme Court in Davis v. Michigan Dept.

of Treasury, 489 U.S. 803, 103 L.Ed.2d 891 (1989). Prior to this decision by the United States Supreme Court, which was filed on 28 March 1989, the pensions of retired employes of the State of North Carolina had been since 1941 exempt from income taxes imposed by the State. Retired federal government employees were exempted from payment of taxes on the first $3,000.00 on their pension benefits. There was no exemption for those who were beneficiaries of private pensions. Beginning in 1979 the first $1,500.00 of pay for members of the National Guard was excluded from taxation. In 1989 this was changed so that members of the National Guard received a $1,500.00 deduction. No comparable benefit was conferred on members of the federal armed forces.

Twenty-three states in 1989 exempted retired state employees from the payment of income taxes on the pension benefits paid to them in a manner similar to the tax scheme of North Carolina. In *Davis* the United States Supreme Court held that such a tax scheme violates 4 U.S.C. § 111 and is unconstitutional.

Following *Davis* the General Assembly of this state took several actions. First it repealed the tax exemption for the retirement benefits of state employees retroactive to 1 January 1989 and created a $4,000 exclusion for the retirement benefits of both state and federal employees. N.C.G.S. § 105-134.6(b) (1989). Second, it authorized federal retirees to claim a tax credit for taxes paid in 1988 on their federal pensions. N.C.G.S. § 105-151.20 (1989). Third, it repealed the $1,500.00 deduction for National Guard compensation. 1989 N.C. Sess. Laws, ch. 1002 (1990).

On 17 August 1990 Judge Currin issued an order certifying this as a class action consisting of two different classes: (1) federal pensioners who were denominated the Class A plaintiffs and (2) federal military personnel who were denominated the Class B plaintiffs. On 3 October 1990 Judge Currin allowed the plaintiffs' motion for

partial summary judgment and ordered the State to refund to the Class A plaintiffs income taxes paid on their federal retirement benefits for tax years 1985 through 1988. Judge Currin ordered the State to refund to the Class B plaintiffs all income taxes they had paid for the years 1986 through 1989 as a result of their not being afforded the $1,500.00 exemption which was given to the members of the National Guard. On 18 October 1990 the defendants gave notice of appeal. On 31 December 1990 Judge Currin issued what was denominated an order supplementing the order for partial summary judgment in which he ordered that interest be paid on the refunds from 15 April following the taxable year for which the tax was paid. He also ordered other things not pertinent to this appeal.

The defendants appealed.

CHARLES H. TAYLOR and WOMBLE, CARLYLE, SANDRIDGE & RICE, by G. EUGENE BOYCE, DONALD L. SMITH, JASPER L. CUMMINGS, JR., WALLACE R. YOUNG, JR., and MICHAEL J. NEWMAN, for plaintiff appellees.

LACY H. THORNBURG, Attorney General, by ANDREW A. VANORE, JR., Chief Deputy Attorney General, EDWIN M. SPEAS, JR., Senior Deputy Attorney General, THOMAS F. MOFFITT, Special Deputy Attorney General, MARILYN R. MUDGE, Assistant Attorney General, and DOUGLAS A. JOHNSTON, Assistant Attorney General, for the State appellant.

ROBINSON, BRADSHAW and HINSON, P.A., by JOHN R. WESTER and DAVID C. WRIGHT III, for defendant appellant Helen A. Powers.

WEBB, Justice.

The first question posed by this appeal is whether the rule of *Davis* is to be applied retroactively. If it is not applied retroactively the defendants are not liable for refunds to the plaintiffs for taxes paid before *Davis* was

decided on 28 March 1989 on federal pensions or military pay. It is a federal question as to whether the rule is to be applied retroactively. The United States Supreme Court has recognized that in some cases it would be inequitable to apply newly announced rules retroactively if prior to the enunciation of the rules parties had reasonably relied on certain principles in ordering their affairs. In such a case the rule is not applied retroactively.

In Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L.Ed.2d 296 (1971), the United States Supreme Court held that a rule should not be applied retroactively and said that in making this determination three factors should be considered as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-107, 30 L.Ed.2d at 306.

In applying *Chevron* to this case we are helped by decisions in Virginia and South Carolina as well as an opinion by the United States Court of Appeals for the Fourth Circuit. Harper v. Virginia Dept. of Taxation, 241 Va. 232, 401 S.E.2d 868 (1991); Bass v. State, —— S.C. ——, 395 S.E.2d 171 (1990); Swanson v. Powers, No. 90-1110, filed 25 June 1991. In fact situations very

similar to the facts of this case the highest courts of Virginia and South Carolina held that *Davis* should not be applied retroactively. In *Swanson* some of the plaintiffs in this case brought a class action against the defendant Powers under 42 U.S.C. § 1983 seeking to hold her personally liable for the $140,000,000.00 they claimed they had overpaid in taxes. The Fourth Circuit Court of Appeals ordered that the case against the defendant Powers be dismissed on the ground she could not reasonably have foreseen the decision in *Davis* and was immune from being sued.

We examine initially the first prong of *Chevron*. *Davis* did not overrule a case but it was a case of first impression. The question then is whether its resolution was clearly foreshadowed. The exemption of state employees from taxation of their pensions had been in effect since 1941. This taxing scheme had received no challenge in court from anyone prior to the decision in *Davis*. Twenty-three states, including North Carolina, had similar plans. If the decision of *Davis* had been clearly foreshadowed we do not believe so many states would have adopted such plans. The Fourth Circuit Court of Appeals said "how the intergovernmental tax immunity doctrine and 4 U.S.C. § 111 applied to North Carolina's revenue statutes was anything but clearly established prior to *Davis*." We agree with the highest courts in Virginia and South Carolina as well as the Fourth Circuit Court of Appeals that the decision of *Davis* was not clearly foreshadowed. This satisfies the first prong of *Chevron*.

As to the second prong of *Chevron* the General Assembly has repealed the provisions of our tax system at which *Davis* was aimed. The retroactive application of *Davis* will have no effect on the operation of the principle which *Davis* would advance. The second prong of *Chevron* is satisfied.

As to the third prong of *Chevron* we can take judicial notice of the fact that this State is in dire financial

straits. The refunds of taxes, as asked by the plaintiffs, will cost the State approximately $140,000,000.00 This would require a further increase in taxes or a further cut in services by the State. We believe the State acted reasonably under the law as it was then understood when it exempted the benefits of state pensioners from income tax and it excluded part of the pay of National Guardsmen. It would be inequitable to require the State to refund the taxes paid by federal pensioners and military personnel. This satisfies the third prong of *Davis.*

The plaintiffs contend that James B. Beam Co. v. Georgia, No. 89-680, filed 20 June 1991, and American Trucking Assns. v. Smith, —— U.S. ——, 110 L.Ed.2d 148 (1990), require that *Davis* be applied retroactively. *Beam* involved an action for the refund of taxes paid on alcoholic beverages to the State of Georgia. The United States Supreme Court had held that a similar Hawaiian tax statute violated the Commerce Clause of the United States Constitution. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 82 L.Ed.2d 200 (1984). The United States Supreme Court held in *Beam* that the rule of *Bacchus* should be applied retroactively. In a plurality opinion Justice Souter said that because the judgment in *Bacchus* applied retroactively in that case, *stare decisis* required that it be so applied in all similar cases. For this reason *Chevron* did not apply in *Beam.* The rule of *Chevron* was not otherwise altered by Justice Souter's opinion and four other Justices affirmed their belief in the viability of the rule of *Chevron.*

This case is distinguishable from *Beam* in that the Court in *Davis* did not pass on the question of retroactivity. Michigan conceded that a refund was appropriate and the United States Supreme Court was not faced with the question of the retroactivity of the rule. In order for a case to be precedent for another case the court in the first case must pass on the issue presented in the second case. United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 97 L.Ed. 54 (1952); United States v.

Mitchell, 271 U.S. 9, 70 L.Ed. 799 (1926). The question of retroactivity was not determined in *Davis* and it may be determined in this case.

American Trucking dealt with the constitutionality of taxes imposed on trucks by the State of Arkansas. In a plurality opinion the United States Supreme Court held that pursuant to the rule of *Chevron*, American Trucking Assns. v. Scheiner, 483 U.S. 266, 97 L.Ed.2d 226 (1987), which held unconstitutional a similar tax by the State of Pennsylvania should not be given retroactive effect. Four justices dissented. In the dissenting opinion it was said that the Arkansas taxpayers were entitled to have the statute imposing the tax held to be unconstitutional. They said that the remedies to be granted depended on state law which had to comply with the United States Constitution. One justice concurred in an opinion which was not favorable to the application of the *Chevron* rule.

We might conclude from *American Trucking* that a majority of the Supreme Court is moving away from the nonretroactive application of constitutional decisions. We do not believe we should so conclude. In *Beam* the Court had an opportunity to say that the rule of *Chevron* should no longer be applied in civil cases and declined to do so. We do not believe we should anticipate a change in the law by the United States Supreme Court, but should adhere to the opinions as they are now written. We believe we have done so.

We are aware that the United States Supreme Court has vacated the judgments in the Virginia and South Carolina cases of *Harper* and *Bass* and remanded for further consideration in light of *Beam*. We believe *Beam* is clearly distinguishable from this case.

The palintiffs argue that the defendants did not plead the *Chevron* rule as an affirmative defense and did not argue it in the superior court. For these reasons, say the

plaintiffs, the defendants cannot ask this Court to apply the rule.

An affirmative defense normally consists of new matter which the pleader contends will avoid the adverse party's claim regardless of whether the facts alleged by the adverse party may be proved. N.C.G.S. § 1A-1, Rule 8(c) (1990). Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981). It may be that rather than new matter constituting an affirmative defense the rule of *Chevron* is simply a part of the body of law governing the determination as to whether the plaintiffs are entitled to a refund.

We do not have to determine whether the rule of *Chevron* must be pled as an affirmative defense. If it is necessary the defendants did so in their ninth defense which was as follows:

> Retrospective relief is inappropriate for the reason that the acts complained of were performed in conformity with law as it then existed and the funds sought to be recovered were expended in the performance of governmental functions for the benefit of the citizens of this State, including plaintiffs.

By pleading no retroactive relief under *Davis* the defendants invoked the rule of *Chevron.*

The plaintiffs, relying on River Birch Associates v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990), State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991) and Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1953), also say that the defendants did not argue the rule of *Chevron* in the superior court and for that reason cannot argue it on appeal. If the rule of *Chevron* is part of the law governing the right of plaintiffs to a refund and not new matter which must be pled as an affirmative defense the defendants argued it to the superior court when they argued the plaintiffs were not entitled to a refund. If it is new matter which must be pled the defendants suffi-

ciently alerted the superior court to this new matter by their ninth defense.

The plaintiffs also argue that the defendants have waived the right not to apply *Davis* retroactively because refunds have been made to some federal pensioners. They say that by intentionally making some refunds they have waived the right to assert the *Chevron* defense on appeal. N.C. Const. art. V, § 2(1) provides:

> The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

It is very difficult under this section for the State to waive its right to collect taxes. In Henderson v. Gill, Comr. of Revenue, 229 N.C. 313, 49 S.E.2d 754 (1948), an agent of the Revenue Department advised the taxpayer how sales taxes were to be reported for the sale of floral products. The taxpayer reported his taxes as he had been advised to do by the agent. The taxpayer was assessed for additional taxes. He asserted that the State was estopped from claiming these additional taxes because he had relied on the agent's instruction and had not collected sales taxes from customers as he could have done if he had been properly instructed by the agent. This Court held that the State was not estopped. We said, "the State cannot, by the conduct of its agents be estopped from collecting taxes lawfully imposed and remaining unpaid." *Id.* at 316, 49 S.E.2d at 756.

We hold that the State has not waived its right to refuse a refund of these taxes.

The plaintiffs argue that regardless of whether the *Chevron* test is applied they are entitled to refunds under our statutes that allow them to sue for refunds. A refund under our statutes might be appropriate if the taxes were improperly collected. If *Davis* is applied only prospectively under *Chevron* the taxes were properly col-

lected and no refund is due under our statutes or otherwise.

We have held that *Davis* does not apply retroactively. For that reason the plaintiffs are not entitled to refunds and we do not consider the question of whether this case was properly held to be a class action. We also do not consider what remedies would be available to the plaintiffs in the event *Davis* should be held to apply retroactively and whether such remedies comply with due process of law. *See* McKesson v. Division of Alc. Bev., —— U.S. ——, 110 L.Ed 2d 17 (1990).

For the reasons stated in this opinion we reverse and remand to the Superior Court of Wake County for the entry of a judgment dismissing the action.

REVERSED AND REMANDED.

MITCHELL, J., dissenting.

I am convinced that the rule announced by the Supreme Court of the United States in Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 103 L. Ed. 2d 891 (1989) must be applied retroactively, and that the majority errs in holding to the contrary. In *Davis*, the Supreme Court held that a scheme of taxation, exempting the pensions of retired state employees from state taxation while not exempting pensions of retired federal employees similarly situated, violates 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental tax immunity. I believe that decision is fully retroactive and is the controlling precedent which must be applied in this case.

Assuming *arguendo* that the *Chevron* test is still valid, three factors must be considered in determining whether a constitutional ruling by the Supreme Court of the United States in a civil case will be applied retroactively. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107, 30 L. Ed. 2d 296, 306 (1971). In the present case, all of those factors weigh in favor of retroactive application of *Davis*.

The first factor to be considered under *Chevron* is whether the decision to be applied has established "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." *Id.* at 106, 30 L. Ed. 2d at 306. Clearly, the Supreme Court's decision in *Davis* did not overrule any past precedent. Further, the majority in *Davis* seems to have felt that its holding there —that imposing state taxes upon the pensions of federal retirees but not upon the pensions of similarly situated state retirees was unconstitutional—had been clearly foreshadowed under the constitutional doctrine of intergovernmental tax immunity. *See Davis*, 489 U.S. 803, 103 L. Ed. 2d 891.

The second factor under *Chevron* requires a consideration of the prior history of the rule announced by the Supreme Court, its purpose and effect, and whether retroactive application will further or retard the operation of the rule. *Chevron*, 404 U.S. 106-107, 30 L. Ed. 2d 306. Unlike my colleagues, I believe that retroactive application of the rule announced in *Davis* will further the operation of that rule. Surely, requiring the State to return money it has collected from one class of taxpayers in a discriminatory and unconstitutional manner will further the operation of the rule announced in *Davis* declaring that the very conduct engaged in by the State violates the Constitution of the United States.

The third and final factor to be considered under *Chevron* is whether retroactive application of the Supreme Court decision in question will produce "inequitable results." *Id.* at 107, 30 L. Ed. 2d at 306. As to this factor, my colleagues take judicial notice of the fact that the State of North Carolina is currently experiencing hard financial times. For that reason, they conclude that it would be "inequitable" to require the State to refund the taxes it has unconstitutionally taken from the plaintiffs under color of state law.

I am unable to see the "inequity" involved in requiring the State to return any money it has unconstitutionally taken from the plaintiffs. In my view, the fact that the State is experiencing financial difficulties has little to do with whether it would be inequitable to require the State to refund the plaintiffs' money. Nothing in the record before us indicates that the plaintiffs, federal pensioners and military personnel, are experiencing any less financial difficulties than the State of North Carolina. Further, unlike the State, the plaintiffs do not have the power of taxation at their disposal when attempting to deal with their financial difficulties. There simply is nothing "inequitable' or wrong about ordering that the State not pick a taxpayers' pocket or in requiring it to

return the money when it is caught doing so. I believe it is entirely equitable and just to apply the rule announced in *Davis* retroactively so as to require that the State return any taxes it has unconstitutionally collected from the plaintiffs.

For the foregoing reasons, I believe that all three factors to be considered under the *Chevron* test weigh heavily in favor of the plaintiffs and against the defendants. Therefore, if the *Chevron* test is still valid, *Davis* must be applied retroactively.

I note, however, that the continuing viability of the *Chevron* test has been brought into question by the decision of the Supreme Court of the United States in James B. Beam Co. v. Georgia, —— U.S. ——, —— L. Ed. 2d —— (1991). Nevertheless, I am convinced that, even if the *Chevron* test has been abandoned, the rule announced in *Davis* must be given fully retroactive application for whichever of the several reasons set forth by the various Justices in *Beam* ultimately prevails in the Supreme Court of the United States. *See generally, Beam, Id.*

The plaintiffs here must receive the full benefit of the rule set forth in *Davis*, just as the plaintiffs in that case did. Therefore, I believe that the plaintiff taxpayers are entitled to have the Constitution of the United States, as interpreted by the Supreme Court of the United States in *Davis*, applied to this case. I respectfully dissent from the decision of the majority to the contrary.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

APPENDIX C

SUPREME COURT OF NORTH CAROLINA
TENTH DISTRICT

No. 64PA91

NORMAN W. SWANSON, *et al.*,
Class A Plaintiffs

CHARLES L. BERRY, *et al.*,
Class B Plaintiffs

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Defendants

From Wake
(9110SC53)

ORDER

Upon consideration of the petition filed by Plaintiffs in this matter for rehearing of the decision of this Court, pursuant to Rule 31, N.C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "Allowed by order of the Court in conference, this the 5th day of December 1991.
>
> s/ Wichard, J.
> For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of December 1991.

CHRISTIE SPEIR PRICE
Clerk of Supreme Court

/s/ Peggy N. Byrd
Assistant Clerk

Copy to:

North Carolina Court of Appeals

Ms. Marilyn R. Mudge, Assistant Attorney General, For the State

Mr. Andrew A. Vanore, Jr., Chief Deputy Attorney General, For the State

Mr. Douglas A. Johnston, Assistant Attorney General, For the State

Mr. Eddie M. Speas, Jr., Sr. Deputy Attorney General, For the State

Mr. Thomas M. Moffitt, Special Deputy Attorney General, For the State

Messrs. John R. Wester and David C. Wright, III, Attorneys at Law, For the State

Messrs. G. Eugene Boyce, Donald L. Smith, Michael J. Newman and Wallace R. Young, Jr., Attorneys at Law, For the Plaintiffs

Mr. Charles H. Taylor, Attorney at Law, For the Plaintiffs

Mr. Ralph A. White, Appellate Court Reporter

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APPENDIX D

SUPREME COURT OF NORTH CAROLINA
TENTH DISTRICT

No. 0674PA91

NORMAN W. SWANSON, *et al.*,
Class A Plaintiffs,

CHARLES L. BERRY, *et al.*,
Class B Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Defendants.

From Wake

PETITION FOR REHEARING

[Filed Sep. 17, 1991]

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME plaintiff-appellee-petitioners ("plaintiffs"), and respectfully petition this Court pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure to reconsider its opinion in the above-styled action filed on August 14, 1991. In support of this petition, plaintiffs show the following:

BACKGROUND

On August 14, 1991, this Court filed its opinion in this case reversing the trial court's entry of partial summary judgment and deciding that under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.Ed.2d 296 (1971), no retroactive relief should be applied to plaintiffs' claims for refunds of unconstitutionally collected taxes. The majority of this Court stated, in part, that while identical judgments of the Supreme Courts of Virginia and South Carolina were vacated by the United States Supreme Court as recently as June 28, 1991 [1] and remanded for reconsideration in light of the decision in *James B. Beam Co. v. Georgia*, —— U.S. ——, 111 S.Ct. 2439 (June 20, 1991), *Beam* was "clearly distinguishable" from the instant case. Slip op. at 13. In *Beam* it was held that where one litigant has received retroactive relief from unconstitutional taxation, all subsequent and similar litigants are likewise entitled to retroactivity. As this Court stated,

> *Beam* involved an action for the refund of unconstitutional taxes paid on alcoholic beverages to the State of Georgia. United States Supreme Court had held that a similar Hawaiian tax statute violated the Commerce Clause of the United States Constitution. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 82 L.E.2d 200 (1984). The United States Supreme Court held in *Beam* that the rule of *Bacchus* should be applied retroactively. In a plurality opinion Justice Souter said that *because the judgment in Bacchus applied retroactively in that case, stare decisis required that it be so applied in all similar cases.* For this reason *Chevron* did not apply in *Beam*.

Slip op. at 11 (Emphasis added.) The majority of this Court then concluded that "[t]his case is distinguisable

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[1] *Bass v. South Carolina*, S. Ct. Dkt. 90-673 (June 28, 1991); *Harper v. Virginia Department of Taxation*, S. Ct. Dkt. 90-1685 (June 28, 1991).

from *Beam* in that the Court in *Davis* did not pass on the question of retroactivity. * * * The question of retroactivity was not determined in *Davis* and it may be determined in this case." *Id.* at 12.

This Court's August 14 majority opinion also stated that this was "an action by the plaintiffs for the refund of certain taxes paid by them *prior to* the decision. . ." in *Davis*, slip op. at 6 (emphasis added), and that a "refund under our statutes might be appropriate if the taxes were improperly collected. If *Davis* is applied only prospectively under *Chevron* the taxes were properly collected and no refund is due . . . ." Slip op. at 14. With regard to Class B plaintiffs, the majority recognized that the trial court granted partial summary judgment in their favor for tax refunds with interest for taxes paid *through 1989*, slip op. at 7-8, the actual payment and collection of which did not occur until 1990 and more than one year *after* the *Davis* decision.

In its ultimate disposition of the case, the Court wrote at page 16 of its opinion as follows:

> For the reasons stated in this opinion we reverse and remand to Superior Court of Wake County for the entry of a judgment dismissing the action.

This Court did not reach the questions of whether the case was properly held to be a class action or what remedies would be available in the event that *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 103 L.Ed.2d 891 (1989), should be held to apply retroactively.

REASONS WHY THIS COURT SHOULD RECONSIDER

1. The Majority Erred In Its Application Of The United States Supreme Court's Rationale In The *Beam* Decision.

The majority's application of *Chevron* hinges on distinguishing *Beam* from *Davis* on the ground that in *Davis*

the question of retroactivity was not considered. Slip op. at 12. The error here is that the majority opinion failed to recognize that in *Bacchus*, the Commerce Clause case on which the *Beam* litigant depended—analogous to *Davis*, the intergovernmental tax immunity case on which the *Swanson* litigants depend—the question of retroactivity was not considered either. *Beam*, 111 S. Ct. at 2445, 2448 and 2451. The question is not, as the majority of this Court concluded, whether *Beam* is analogous to *Davis*, but rather, whether *Bacchus* is analogous to *Davis*. That this is the proper analogy is apparent from the *Beam* opinion itself in which Justice Souter made specific reference to *Davis*: "Because the Court in *Bacchus* remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided . . . *Cf. Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 817." *Id.* at 2445-46. As the Court in *Beam* read *Bacchus* as having followed the normal rule of retroactivity, thus requiring retroactivity for the Beam Distilling Company, it noted that "any consideration of remedial issues necessarily implies that the precedential question has been settled to the effect that the rule of law will apply to the parties before the Court." *Id.* at 2445. Further, Justice White wrote in his concurring opinion that even if *Bacchus* was wrongly applied retroactively to the litigants there "that is water over the dam, irretrievably it seems to me. There being no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated, and *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L.Ed.2d 649 (1978), having overruled such a practice in criminal cases . . . I agree that the petitioner here should have the benefit of *Bacchus*, just as Bacchus Imports, Ltd. did." *Id.* at 2448-49.

Applied to plaintiffs' claims, *Beam* requires refunds because the question is simply whether *Davis* was applied retroactively itself—that is, whether Mr. Paul Davis re-

ceived the benefit of the decision in that case. *Beam* 111 S. Ct. at 2446. He did. The very question presented in *Davis* was whether Mr. Davis' federal pension was legally taxable under the Michigan Income Tax Law for years 1979 through 1984. The Supreme Court held that it was not. *Davis*, 489 U.S. at 806-07, 817.[2] Thus, all similarly situated taxpayers must, as did Mr. Davis, receive the benefit of the *Davis* decision based on principles of equality and *stare decisis*. *Beam*, 111 S. Ct. at 2446.

The rationale of *Beam* is even more applicable here in view of the fact that the state granted refunds to a small percentage of pensioner taxpayers, thus extending the *Davis* rule retroactively to at least those claimants, although for only a one-year recovery period. Such differential treatment of similarly situated claimants is the precise harm that *Beam* prohibits. Accordingly, principles of equality and fairness require that where some North Carolina taxpayers have received the retroactive benefit of *Davis* from defendants themselves, then all similarly situated taxpayers are likewise entitled to the same treatment.[3] Aside from the principles of plain, basic

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[2] While the majority of this Court notes at page 12 of its opinion that Michigan conceded retroactivity, it overlooks the fact that the U.S. Supreme Court in *Davis* did not rely solely on Michigan's concession in ordering that Mr. Davis was entitled to a refund. The Court wrote that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund. *See Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 247, 52 S. Ct. 133, 136, 76 L.Ed. 265 (1931)." *Davis*, 109 S. Ct. at 1509. In the *Iowa-Des Moines Bank* case, the Court ordered refund of unconstitutionally collected taxes. Its citation and usage in *Davis* by the Court in ordering tax refunds was not a mere gratuity.

[3] North Carolina Attorney General Thornburg publicly acknowledged this should be the case. (Plaintiff's Br. p. 9, fn. 6.) He did this officially for not only a one-year, but for a three-year period. (*See*, April 11, 1989, Correspondence of Attorney General Thornburg to then Secretary Helen Powers submitted to this Court for addition to the record on appeal by motion of May 15, 1991 of plaintiffs.)

fairness, any other conclusion results in judicial approval of arbitrary and capricious classification by state government against a large segment of North Carolina's elderly taxpaying citizens and contrary to their rights of equal protection under the law.[4]

2. The Majority Opinion Erred In Its Application Of *Chevron* For Taxes Imposed and Collected *After* The *Davis* Decision.

Even under the majority's own statement of facts and application of *Chevron*, the defense only prevents retroactive relief for taxes imposed *prior to* the *Davis* decision. Clearly, Class B plaintiffs paid taxes for the 1989 tax year (due April 15, 1990) imposed *after* the *Davis* decision. (R p. 7, Answer ¶¶ 24, 25.) The discriminatory taxing scheme imposed against them was not even repealed until July 20, 1990. *See* 1989 N.C. Sess. Laws, Ch. 1002 (1990), entitled "An Act To Conform The Laws Of

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[4] In addition to the argument that the majority of this Court wrongly applied the rationale of *Beam*, Plaintiffs contend that the majority also misapplied *Chevron*. The majority opinion overlooks the facts that revenue officials knew for years of the discriminatory treatment, (Plaintiff's Br. p. 58, fn. 42), that it has been well settled in North Carolina for at least a half-century that retirement benefits constitute deferred compensation, (Plaintiff's Br. pp. 58-59; R. Ex. 1, pp. 13-14), and that the Secretary of Revenue received withholdings on federal retirement benefits pursuant to a state statute authorizing income tax withholdings from "wages" of federal employees. N.C. Gen. Stat. § 105-163.23 (R. Ex. 75; Plaintiff's Br. p. 59; R. Ex. 1, p. 13-14.) *Chevron*, thus, cannot be applicable as *Davis* was not necessary in North Carolina to make these constitutional violations apparent. In fact, it is undisputed that defendant revenue officials were in possession of a detailed treatment of *Davis* as early as July 1988, (Plaintiff's Br. p. 67; R. Ex. 1, p. 13; R. Exs. 15 and 16), and by January 11, 1989, of a North Carolina State Legislative Tax Fairness Report characterizing the State's taxing scheme to be discriminatory. (Plaintiff's Br. p. 58; R. Ex. 20.) Notwithstanding this, the Revenue Department incredibly stated it had "no position" on pre-*Davis* proposed corrective tax fairness legislation. (R. Ex. 22.)

North Carolina To The Requirements Of Certain Federal Laws And Constitutional Principles."[5] (Plaintiff's Br. pp. 13, 14.)

3. In Directing That The Action Be Dismissed The Majority Opinion Overlooked Unlitigated State Law Claims.

Appealed by the state and reversed by this Court's August 14 opinion was a "partial" summary judgment granting refunds to plaintiffs based on their claims under 4 U.S.C. § 111, the constitutional doctrine of intergovernmental tax immunity, and *Davis*. (Plaintiff's Br. p. 2.) The trial court never ruled on plaintiffs' claims under the state constitution, including Art. I § 16, Art. I § 19, and Art. V § 2. Though the trial court granted only partial summary judgment, neither the motion nor the trial court's judgment specifically elaborated on the ground or reason for summary judgment. Those matters were set forth in the briefs filed with the trial court, which were not before this Court. The prospective-only application of federal constitutional law under *Chevron* has no application to the resolution of those state law claims.

Defendants' notice of appeal from the trial court's partial summary judgment was expressly made pursuant to G.S. § 1-277 and 7A-27(d), the order being inter-

[5] No refund remedy except that ordered by the trial court below has been provided to Class B plaintiffs. (R. Ex. 1, pp. 8-9, Plaintiffs' Br. pp. 5, 15.) Defendants' failure to take any remedial steps regarding Class B plaintiffs for illegal taxes imposed *after Davis* plainly evidences governmental disregard for taxpayers' rights. This is, unfortunately, the type of bureaucratic irresponsibility that necessitates judicial intervention. Plaintiffs urge this Court not to condone or ignore defendants' conduct. (*See also*, Plaintiffs' Br. p. 9, fns. 5 and 6, pp. 6-7, fn. 4.) The North Carolina Supreme Court must reject official action which is so fundamentally contrary to principles of honorable and responsible governmental taxation of individual citizens.

locutory in nature but immediately appealable as affecting a substantial right. (R pp. 113-115.) It is apparent that this important procedural fact was overlooked by this Court in its opinion and, in particular, its direction to the trial court to dismiss the entire action. Attached to this petition is an affidavit of the presiding trial court judge stating that the state law claims were never ruled on nor was there any relief ever granted or denied on them and that those matters were not before the trial court for consideration. *See* Exhibit A. The August 14 opinion should have stated that the trial court partial summary judgment granting tax refunds to plaintiffs was reversed and the case remanded for further proceedings not inconsistent with its opinion.

Accompanying this petition are certificates of two attorneys who, pursuant to Rule 31, state that it is their opinion that the August 14 decision is in error on the points specifically raised herein. *See* Exhibits B and C. Based on the foregoing, plaintiffs request that this Court reconsider its opinion.

Respectfully submitted this the 17th day of September, 1991.

WOMBLE CARLYLE SANDRIDGE & RICE

By: /s/ WALLACE R. YOUNG, JR.
G. Eugene Boyce, N.C. State Bar No. 0435
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(919) 924-6064

EXHIBIT A

AFFIDAVIT

I, the undersigned being first duly sworn say as follows:

I am over the age of eighteen (18), suffer no legal disabilities and am competent to testify to the matters set forth herein. Until 31 December 1990, I was a special judge of the Superior Court and resided in Wake County. While a special judge, I presided over a number of hearings in Wake County in a case entitled *Swanson et al v. State of North Carolina et al*, 90CVS03127. On 3 October, 1990, I allowed Partial Summary Judgment for Plaintiffs. This granting of Partial Summary Judgment was reversed by the Supreme Court of North Carolina in a 4-3 decision filed in said Court on 14 August 1991, No. 64PA91, the majority opinion having been written by Webb, J. with a dissenting opinion written by Mitchell, J. The Complaint in the foregoing action alleged federal and state claims for relief. At the hearing on Partial Summary Judgment, the only issues briefed, argued or for the court's consideration were the federal issues and no state issues were briefed, argued or before the Court. The Supreme Court's mandate to remand to the Superior Court for a dismissal of the action would result in dismissal of claims not yet litigated by the parties before the trial court.

Further, this affiant sayeth not.

/s/ SAMUEL T. CURRIN
Samuel T. Currin

Sworn to and subscribed before me this the 17th day of September, 1991.

/s/ SHARLENE J. THOMAS
Notary Public

EXHIBIT B

ATTORNEY CERTIFICATE

Robert L. Emanuel, being first duly sworn, deposes and says:

1. I am attorney licensed to practice law in the State of North Carolina and have been so licensed for more than five years.

2. I have no personal interest in the subject of the action captioned *Swanson v. State et al.*, No. 0674PA91 (Wake County, 90 CVS 0312), nor have I been counsel to any party in that action.

3. I have carefully examined the North Carolina Supreme Court decision of August 14, 1991 in the above-referenced action, the briefs of the parties, appellate record and the attached petition for rehearing and the authorities cited therein and am of the opinion that the petition is well-grounded, as the majority's decision appears to: (1) misapprehend or misstate the law of retroactive application by the United States Supreme Court holding state tax statutes unconstitutional, as recently enunciated in *Beam v. Georgia*, 111 S. Ct. 2439 (June 20, 1991) and as set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); (2) overlook or misapprehend the undisputed facts of this case that taxes were imposed and collected from Class B plaintiffs for up to one year after the United States Supreme Court decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), such taxes being subject to refund if deemed unconstitutional, even if a prospective-only application of the *Davis* decision is appropriate in this case; and (3) overlooks the fact that the appeal in this action was from a "partial" summary judgment and that additional unadjudicated claims for relief under state constitutional provisions in-

cluded in plaintiff's complaint would in no way be affected by an application of *Chevron Oil Co. v. Huson.*

This the 17th day of September, 1991.

[SEAL]

/s/ Robert L. Emanuel
ROBERT L. EMANUEL
N.C. State Bar No. 1343

Sworn to and subscribed this
the 17th day of September, 1990.

/s/ Susan Powell Newell
Notary Public
My Commission Expires: March 26, 1996

EXHIBIT C

ATTORNEY CERTIFICATE

Marvin Schiller, being first duly sworn, deposes and says.

1. I am attorney licensed to practice law in the State of North Carolina and have been so licensed for more than five years.

2. I have no personal interest in the subject of the action captioned *Swanson v. State et al.*, No. 0674PA91 (Wake County, 90 CVS 0312), nor have I been counsel to any party in that action.

3. I have carefully examined the North Carolina Supreme Court decision of August 14, 1991 in the above-referenced action, the briefs of the parties, appellate record and the attached petition for rehearing and the authorities cited there in and am of the opinion that the petition is well-grounded, as the majority's decision appears to: (1) misapprehend or misstate the law of retroactive application of decisions by the United States Supreme Court holding state tax statutes unconstitutional, as recently enunciated in *Beam v. Georgia*, 111 S.Ct. 2439 (June 20, 1991) and as set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); (2) overlook or misapprehend the undisputed facts of this case that taxes were imposed and collected from Class B plaintiffs for up to one year after the United States Supreme Court decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), such taxes being subject to refund if deemed unconstitutional, even if a prospective-only application of the *Davis* decision is appropriate in this case; and (3) overlooks the fact that the appeal in this action was from a "partial" summary judgment and that additional unadjudicated claims for relief under state constitutional provisions included in the plaintiff's complaint would in

no way be affected by an application of *Chevron Oil Co. v. Huson.*

This the 16 day of September, 1991.

/s/ Marvin Schiller
MARVIN SCHILLER
N.C. State Bar. No. 6838

[SEAL]

Sworn to and subscribed this
the 16th day of September, 1990.

/s/ Alyce M. Bassett
Notary Public
My Commission Expires: 2-11-93

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document in the above-captioned action upon the parties below by first class mail, postage prepaid and correct, addressed as follows:

Marilyn R. Mudge
Assistant Attorney General
Room 372, Revenue Building
P.O. Box 629
Raleigh, NC 27602-0629

Douglas A. Johnston
Assistant Attorney General
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John R. Wester and
David C. Wright, III
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This the 17th day of September, 1991.

/s/ Wallace R. Young, Jr.
WALLACE R. YOUNG, JR.
Attorney for Plaintiffs

APPENDIX E

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

---

90 CVS 03127

NORMAN W. SWANSON, *et al.*,
Class A Plaintiffs,

CHARLES L. BERRY, *et al.*,
Class B Plaintiffs,

VS.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually, BETSY Y. JUSTUS as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Defendants.

PARTIAL SUMMARY JUDGMENT

THIS MATTER came on for hearing before the undersigned judge of Superior Court on Plaintiffs' Motion for Partial Summary Judgment, filed 17 August 1990, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, in favor of Class A Plaintiffs on their claims for refunds of taxes unlawfully and unconstitutionally collected from them for tax years 1985 through 1988 and in favor of Class B Plaintiffs on their claims for refunds of taxes unlawfully and unconstitutionally collected from them for tax years 1986 through 1989.

The Court after carefully considering the parties' legal memoranda and evidentiary materials, including, exhibits,

affidavits, deposition transcripts, matters of record, and the arguments of counsel made in open court on 31 August 1990, has determined that no genuine issue of material fact exists and that Plaintiffs are entitled to summary judgment as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that Plaintiffs' Motion for Partial Summary Judgment be and is hereby *GRANTED* and that:

(1) Class A Plaintiffs, federal retirees, have and recover of Defendants, the State of North Carolina, Betsy Y. Justus as Secretary of the North Carolina Department of Revenue, the North Carolina Department of Revenue and Harlan Boyles, Treasurer of the State of North Carolina, refunds, of North Carolina income taxes unlawfully and unconstitutionally collected on their federal retirement benefits for tax years 1985 through 1988, with interest as provided by law; and

(2) that Class B Plaintiffs, federal active duty and military reserve personnel, have and recover of Defendants, the State of North Carolina, Betsy Y. Justus as Secretary of the North Carolina Department of Revenue, the North Carolina Department of Revenue and Harlan Boyles, Treasurer of the State of North Carolina, refunds of North Carolina income taxes unlawfully and unconstitutionally collected on their federal compensation as a result of their not being afforded a $1,500 per year exemption as were members of the North Carolina National Guard for tax years 1986 through 1989, with interest as provided by law.

The clerk is directed to enter judgment herein in accordance with N.C. Gen. Stat., Sec. 1A-1, Rule 58. With the consent of counsel given in open court, this Judgment is signed out of county, out of session and out of term.

/s/ Samuel T. Currin
SAMUEL T. CURRIN
Superior Court Judge

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

---

90 CVS 03127

NORMAN W. SWANSON, *et al.*,
Class A Plaintiffs,

CHARLES L. BERRY, *et al.*,
Class B Plaintiffs,

vs.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually, BETSY Y. JUSTUS as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Defendants.

ORDER SUPPLEMENTING PARTIAL SUMMARY JUDGMENT

[Filed Dec. 31, 1990]

This cause coming on to be heard and being heard before the undersigned Judge Presiding on Plaintiffs' Motion to Supplement Partial Summary Judgment and Other Affirmative Relief and Motion for Attorneys' Fees heretofore filed, and which said Motions were heard on 26 October 1990. Following said hearing the Court took the matters and issues under advisement, IT IS NOW THEREFORE ORDERED as follows:

1. Defendants' objection to Plaintiffs' Motion to Supplement Partial Summary Judgment and Other Affirmative Relief and Motion for Attorneys' Fees for the reason that this Court is divested of jurisdiction to entertain said Motions by reason of Defendants' 18 October 1990 Notice of Appeal is hereby overruled.

2. Interest on any refunds paid pursuant to the Partial Summary Judgment shall be calculated from and after 15 April of each year following the taxable year for which the tax is paid, or the date of payment, whichever occurs later.

3. The responsibility and cost of administering class notification shall be borne by Defendants herein; provided, this portion of said Order is stayed during the pendency of any appeal to the Appellate Division of the General Court of Justice.

4. Plaintiffs' request that the Court require Defendants designate a common fund out of which refunds shall be paid is denied without prejudice to Plaintiffs to renew said motion in the event the granting of Plaintiffs' Motion for Partial Summary Judgment is affirmed either in whole or in part by the Appellate Division of the General Court of Justice, or in the event Plaintiffs' succeed on their other claims for relief contained in their complaint, which claims have not heretofore been ruled on.

5. Though no formal ruling was made on Defendants' Motion for Partial Summary Judgment, the granting of Plaintiffs' Motion for Partial Summary Judgment was a denial of Defendants' Motion as a matter of law. To clarify the Record, Defendants' Motion for Partial Summary Judgment is denied *nunc pro tunc* to 9 October 1990.

6. With regard to Plaintiffs' Motion for Attorneys' Fees, any such fees should be paid out of a common fund, if any such fund is hereafter established, but Plaintiffs' present Motion is denied without prejudice pending establishment of a common fund, if any, as hereinbefore

referred to. In the event no common fund is established, attorneys's fees shall be paid as the Court may direct as provided by law.

7. The Court determines there is no just reason for a delay in the appeal of this action in that the partial summary judgment, as supplemented, constitutes a final judgment as to fewer than all the issues or parties within the meaning of N.C. Gen. Stat. § 1A-1, Rule 54(b) and the order on class certification constitutes an intermediate order involving the merits and necessarily affecting the judgment within the meaning of N.C. Gen. Stat. § 1-278.

Counsel for all parties stipulated and agreed in open court that this order could be signed out of term or out of district if that should become necessary.

This the 31st day of December, 1990.

/s/ [Illegible]
Judge Presiding

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Case No. 89-282-CIV 5-H

NORMAN W. SWANSON, HENRY F. MURRAY, CARL L. WHITNEY, WILLIAM Z. NICHOLSON, III, CHARLES L. DANCEY, MELVIN F. EYERMAN, IRA N. SCHWARZ, JOHN L. POWELL, JR., MRS. GALENA ELWORTH, DONALD V. WALLACE, WILLIAM E. DENTON, ROBERT A. NISBET, WALTER J. BARTNIKOWSKI, RALPH P. HUNT, MARION B. ZOLLICOFFER, WILLIAM H. TALBERT, BILLY CLARK, WALLACE M. DAVIS, GRADY L. STRANGE, HAMILTON M. HOWE, MARY L. PRITCHARD, ROBERT B. CAMPBELL, individually and for the benefit and on behalf of all other similarly situated,

Plaintiffs,

VS.

HELEN A. POWERS, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLON BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Defendants.

ORDER

[Filed Apr. 14, 1989]

This matter is before the court upon the motion of Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil Procedure for a certification of the above-styled action as a class action for the sole purpose of giving any

notice to the North Carolina Department of Revenue that may be required to obtain income tax refunds as required by G.S. § 105. Based on the allegations set forth in the Plaintiff's Complaint and after considering arguments of counsel, this court is of the opinion that good cause exists for granting the instant motion.

IT IS THEREFORE ORDERED that:

1. The above-styled action be certified as a class action for the sole purpose of giving any notice to the North Carolina Department of Revenue that may be required to obtain income tax refunds and required by G.S. § 105 of the North Carolina General Statutes.

This the 14th day of April, 1989.

/s/ F. T. Dupree Jr.
F. T. DUPREE, JR.
Senior U.S. District Court Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 89-282-CIV-5-H

NORMAN W. SWANSON, *et al.*,
Class A Plaintiffs,

CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER, and PAUL H. TURNEY,
Class B Plaintiffs,

v.

HELEN A. POWERS, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE, and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,
Defendants.

ORDER

[Filed Aug. 16, 1990]

This matter is before the court on the defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). For the reasons discussed below, the court grants the motion in part and denies it in part.

FACTS

The Class A Plaintiffs are retired federal employees who challenge former North Carolina income tax laws that treated the income of retired federal employees less favorably than the income of retired state employees, Federal retirement income was subject to a partial exemption, but state retirement income was exempted completely. This taxing scheme is indistinguishable from that struck down by the Supreme Court in *Davis v. Michigan Dep't of Treasury*, —— U.S. ——, 109 S. Ct. 1500, 108 L.Ed.2d 891 (1989), under 4 U.S.C. § 111 and the principle of intergovernmental tax immunity. The plaintiffs allege that the state's administration of its income tax laws deprive them of their civil rights in violation of 42 U.S.C. § 1983, 4 U.S.C. § 111, and the equal protection and due process clauses of the United States Constitution.

Class B plaintiffs are active-duty military personnel and reservists who challenge the statutory $1500 annual income tax exclusion for compensation paid to members of the North Carolina National Guard. Both classes seek damages in the form of refunds, a declaration that the collection of tax on such income violates federal law, and an injunction barring the defendants from collecting such taxes in the future.

The defendants have filed this motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. The parties have extensively briefed the issues, and the court has conducted a lengthy hearing. Accordingly, the motion is ripe for ruling.

DECISION

I. The Tax Injunction Act

The defendants contend that this action is barred by the Tax Injunction Act of 1937, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This statute applies to requests for declaratory relief, injunctive relief, and damages. *See California v. Grace Brethren Church*, 457 U.S. 393, 102 S. Ct. 2498, 73 L.Ed.2d 93 (1982); *Moss v. Georgia*, 655 F.2d 668 (5th Cir. 1981). The plaintiffs invoke the federal instrumentalities exception to the Tax Injunction Act. Alternatively, the plaintiffs contend that the state remedy is not plain, speedy, and efficient.

Under the federal instrumentalities exception, the Tax Injunction Act does not bar actions in which the United States or one of its instrumentalities is the plaintiff. *See, e.g., Dep't of Employment v. United States*, 385 U.S. 355, 87 S. Ct. 464, 17 L.Ed.2d 414 (1966). The parties have cited to the court no federal cases holding that employees are or are not instrumentalities. The plaintiffs rely on language in *Davis* tracing the development of the right of federal employees to invoke the doctrine of intergovernmental tax immunity. The plaintiffs argue that under *Davis* the definition of a federal instrumentality is coextensive with taxpayers protected by intergovernmental tax immunity and 4 U.S.C. § 111.

The court finds, however, that federal employees are not federal instrumentalities exempted from the Tax Injunction Act. *Davis*, which began in the Michigan state courts, does not address the applicability of the Tax Injunction Act. The Court did, as the plaintiffs suggest, outline the development of the taxation of the employees of one sovereign by another. In so doing, the Court stated that 4 U.S.C. § 111 codified *Graves v. New York*, 306 U.S. 466, 59 S. Ct. 595, 83 L.Ed. 927 (1939). It is clear from *Graves* that federal employees were exempt from state taxation not because they were federal instrumen-

talities, but because they were employees of instrumentalities. 306 U.S. at 483 n.2, 485. *See also New York v. Graves*, 299 U.S. 401, 408, 57 S. Ct. 269, 272, 81 L.Ed. 306 (1937).[1]

Because intergovernmental tax immunity cases draw a definitional distinction between instrumentalities and their employees, the court concludes that a similar distinction exists under the Tax Injunction Act. The conclusion is supported by the fact that all cases applying the instrumentalities exception involve entities that are clearly distinguishable from the individual plaintiffs in this action. *See, e.g., Dep't of Employment*, 385 U.S. at 359; *Federal Reserve Bank v. Comm'r of Corporations and Taxation*, 499 F.2d 60 (1st Cir. 1974); *Federal Land Bank v. Bd. of County Comm'rs*, 582 F.Supp. 1507 (D.Colo. 1984); *First Nat'l Bank v. Dickinson*, 291 F.Supp. 855 (N.D.Fla. 1968), *affirmed*, 393 U.S. 409, 89 S. Ct. 685, 21 L.Ed.2d 634 (1969). Moreover, several identical actions brought in federal court by federal employees have been dismissed pursuant to the Tax Injunction Act. *Waldron v. Collins*, 788 F.2d 736 (11th Cir.), *cert. denied*, 479 U.S. 884, 107 S. Ct. 274, 93 L.Ed.2d 250 (1986); *Todd v. Johnson*, 718 F. Supp. 1305 (S.D. Miss. 1989); *Melof v. Hunt*, 718 F.2d 877 (M.D.Ala. 1989).[2]

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[1] In *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L.Ed.2d 580 (1982), the Court held that independent contractors are not federal instrumentalities protected by the doctrine of intergovernmental tax immunity. The Court drew a distinction between independent contractors and employees, whom the court described as "constituent parts" of the United States. *New Mexico*, 455 U.S. at 740, 102 S. Ct. at 1386. A possible interpretation of this case is that employees are instrumentalities. However, this case did not involve the Tax Injunction Act; rather, it seems to be consistent with the prior line of cases holding that federal employees are protected by intergovernmental tax immunity because they are employees of instrumentalities, not because they are themselves instrumentalities.

[2] None of these cases specifically addressed the federal instrumentalities exception.

Accordingly, the court finds that the plaintiffs are not federal instrumentalities exempted from the Tax Injunction Act.

The court finds, however, that the state remedy is not plain, speedy, and efficient. A plain, speedy, and efficient remedy is one that provides a taxpayer with a full hearing and judicial determination at which he or she may raise any and all constitutional objections. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 101 S. Ct. 1221, 67 L.Ed.2d 464 (1981). The state remedy does not have to be equal to the federal remedy. *Ayers v. Polk County*, 697 F.2d 1375, 1377 (11th Cir. 1983). A state remedy is inadequate, however, if some "uncertainty" surrounds it. *Rosewell*, 450 U.S. at 516-17. The plaintiffs contend that the defendants have so confused the state remedy that it is impossible to enforce the plaintiffs' federal rights in state court.

The uncertainty surrounds the statute of limitations. The defendants contend that the plaintiffs' state remedy is governed by N.C. Gen. Stat. § 105-267, which provides that a taxpayer contesting the illegality of a tax must pay the tax and then file a written demand for refund within 30 days. If the refund is denied, the taxpayer has three years to file an action in the Superior Court of Wake County or the county of the taxpayer's residence. On its face, this remedy is plain, speedy, and efficient. *See Grace Brethren Church*, 457 U.S. at 412.

Confusion arises, however, out of the existence of N.C. Gen. Stat. § 266.1, which provides that taxpayers may file for refunds for mathematical or other errors within three years of payment. If no refund is given, the taxpayer has 90 days to file an action in the Superior Court of Wake County or the county of residence. The two statutes address different situations. Section 267 provides a remedy by which to contest illegal or unconstitutional taxes; section 266.1 provides a remedy by which to re-

ceive refunds for overpayment caused by mathematical or other errors. *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

This remedy is uncertain because of the conduct of the individual defendants and the Department of Revenue. All interpretation and explanation of these statutes provided to taxpayers by the defendants indicated that *any* request for refund may be made within three years of payment. This information was provided in "Individual Tax Income Bulletins" published by the Department of Revenue. Plaintiffs' Memorandum, Exhibit 2. The defendants' instruction booklets are to the same effect. Moreover, after *Davis* was decided, the Department of Revenue announced publicly that refunds of taxes paid within three years would be allowed under the customary practice. Plaintiffs' Memorandum, Exhibits 33, 34. Taxpayers were not told of the 30-day rule until four days before the filing deadline for 1989, well after many of the plaintiffs had filed their returns.

The defendants, soon after the filing of 1989 tax returns, began denying *Davis* refund requests pursuant to the 30-day statute of limitations of section 267. They also raise this statute as a defense in related state court litigation and in this action. The defendants have thereby deprived the plaintiffs a full hearing and judicial determination of their claims. *Rosewell*, 450 U.S. at 513.

A further complication is that the defendants cannot administer the 30-day rule. The defendants do not date-stamp returns filed prior to the deadline. The defendants assume that the date the return is signed is the date of payment, regardless of when the return was filed. Therefore, those plaintiffs filing their returns more than 30 days after signing the returns never had the opportunity to file a claim.

The state remedy is also inadequate because it does not provide for a class action, thereby requiring individual

litigation of thousands of refund claims. Each of the claims is small enough to make the cost of such litigation prohibitive. The plaintiffs estimate that Class A contains 89,111 members and that Class B contains 49,486 members. (Exhibits 10, 11, and 12). At the hearing, plaintiffs' counsel estimated the average refund to be approximately $700. Some courts have held that the unavailability of class actions does not in itself render the state remedy inadequate. *See, e.g., Waldron,* 788 F.2d at 738. The court finds, however, that the absence of a class action procedure may be considered along with all other facts in determining whether the state remedy is adequate for puposes of the Tax Injunction Act.

The remedy provided by the state to the Class A Plaintiffs is the recently-enacted N.C. Gen. Stat. § 105-151.20. Pursuant to this statute, federal retirees who paid state income tax on federal retirement income for the taxable year 1988 may claim a tax credit in that amount in equal installments over a three-year period beginning with the taxable year 1990. This remedy is inadequate because it fails to take into account the time value of the plaintiff's money. The state is in essence admitting that the tax was improper, but some of the money will not be returned until five years after payment.[3] Furthermore, given that these plaintiffs are retirees, it is reasonable to assume that a certain number of them will die in the next three years and will never receive their money. Others may have no tax liability from 1990-1992 and so will be unable to use the credit. In reality, this remedy provides the class with only a partial refund.

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[3] The Court in *Rosewell* held that the state's failure to pay interest and the unavoidable delay in the litigation process did not prohibit the remedy from being speedy or efficient. 450 U.S. at 517-22, 101 S. Ct. at 1281-83. The defendants, however, are doing more than not paying interest; they are intentionally extending the period for refund through as late as April 15, 1993. This delay is not the unavoidable result of litigation, but is the intentional choice of the state legislature.

See George Railroad & Banking Co. v. Redwine, 342 U.S. 299, 303, 72 S. Ct. 321, 324, 96 L.Ed.2d 335 (1952) (remedy is inadequate if only partial refund will be recovered).[4] This statute provides no remedy to the Class B plaintiffs.

For the above-stated reasons, the court finds that the state remedy is not plain, speedy, and efficient. *Hillsborough v. Cromwell*, 326 U.S. 620, 624-26, 66 S. Ct. 445, 90 L.Ed. 358 (1946). Therefore, this action is not barred by the Tax Injunction Act.

II. Comity

Since the court has found that the state remedy is not plain, speedy, and efficient for purpose of the Tax-Injunction Act, it necessarily follows that the remedy is not plain, adequate, and complete for purposes of comity. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116, 102 S. Ct. 177, 70 L.Ed.2d 271 (1981). Therefore, comity does not bar the court from exercising jurisdiction over this action.

III. Eleventh Amendment

The plaintiffs' claims for monetary damages in the form of refunds are barred by the eleventh amendment. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974). The plaintiffs attempts to characterize their action as one for "equitable restitution." The Supreme Court has stated, however, that plaintiffs may not circumvent the eleventh amendment by characterizing

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[4] Furthermore, this legislation, enacted after *Davis*, treats federal retirees differently than other taxpayers in that the retirees must receive their refunds over three years instead of in a lump sum payment. This legislation was enacted after the parties filed their briefs such that the parties have not addressed the issue of whether this remedy is an ongoing constitutional violation. *See* Footnote 5, *infra*.

a damages claim as one for equitable restitution. *Edelman*, 94 S. Ct. at 1356. It has long been established that unconstitutional taxes may not be recovered from the state treasury. *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 64 S. Ct. 873, 88 L.Ed. 1121 (1944); *Smith v. Reeves*, 178 U.S. 436, 20 S. Ct. 919, 44 L.Ed. 1140 (1900).

The plaintiffs contend that federal courts may order relief that has some effect on the state treasury. For example, in *Milliken v. Bradley*, 433 U.S. 267, 289, 97 S. Ct. 2749, 2761-62, 53 L.Ed.2d 745 (1977), a federal court ordered a state to spend $5.8 million to upgrade its educational system. In *Papasan v. Allain*, 478 U.S. 265, 282, 106 S. Ct. 2932, 2942, 92 L.Ed.2d 209 (1986), the Court distinguished between the expenditure of state funds necessary for future compliance with a court order and awards for accrued monetary liability. A federal court may order the former type of relief, but not the latter. It is clear, however, that the plaintiffs are seeking an award for monetary liability, which is precisely what the eleventh amendment forbids.

The plaintiffs suggest as a possible remedy a tax credit applied to future tax years. Substantively, however, this remedy is still one for accrued monetary liability that would be satisfied out of the general revenues of the state. The plaintiffs cannot avoid the eleventh amendment by receiving their award in the form of future tax credits, rather than present cash payments.

The plaintiffs contend finally that the eleventh amendment does not bar their damages claims because they are federal instrumentalities. *See, e.g., United States v. Mississippi*, 380 U.S. 128, 140-41, 85 S. Ct. 808, 814-15, 13 L.Ed.2d 717 (1965); *FDIC v. New York*, 732 F.Supp. 26 (S.D.N.Y. 1990). The court previously ruled, however, that federal employees are not federal instrumentalities. *Supra*, pp. 3-5. Therefore, the court must dis-

miss the damages claims against the defendants in their official capacities.[5]

IV. Powers' Qualified Immunity

The defendant Powers contends that she is protected from the damages claims by the doctrine of qualified immunity. Powers is shielded from liability if she can show that her conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396, 410 (1982). It must be objectively discernible in light of the law as it then existed that the defendant's conduct would violate that right. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987).

Powers contends that the *Davis* decision established a new rule of law. The court finds, however, that the doctrinal underpinnings of *Davis* are long-standing principles. Intergovernmental tax immunity has its genesis in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819). Similarly, 4 U.S.C. § 111, which plainly allows for only non-discriminatory taxation of federal employees, was enacted in 1939.

The substance of the defendant's argument is that she should not be required to forecast Supreme Court decisions at the risk of personal liability. In the court's opinion, however, *Davis* was inevitable. State officials should not be allowed to continue blatantly unconstitutional conduct until the courts specifically rule it unconstitutional. Powers had the statutory responsibility to regulate, monitor, advise, and act upon problems in ad-

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[5] The eleventh amendment does not bar the damages claims against Powers in her individual capacity. *Scheuer v. Rhodes*, 416 U.S. 232, 237-38, 94 S. Ct. 1683, 1687 (1974). Nor does it bar the claims for injunctive and declaratory relief necessary to correct an ongoing constitutional violation. *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 426, 88 L.Ed.2d 371 (1985).

ministering the state tax code. *See* N.C. Gen. Stat. §§ 143B-218, 143B-219, 147-88, 105-257, and 105-453. Nevertheless, she collected unconstitutional taxes that she should have known were unconstitutional.

Soon after the enactment of 4 U.S.C. § 111, the North Carolina Attorney General reported in a February 12, 1940, Memorandum to the Commissioner of Revenue that section 111 "gives the consent of Congress to *non-discriminatory state taxation* of the compensation of Federal employees." Plaintiffs' Memorandum, Exhibit 14. The state instituted its discriminatory tax scheme in 1941; potential problems were first noted in a 1941 *North Carolina Law Review* article: "This may be permissible with respect to such state taxes as the income tax (unless it eventually face[s] trouble because of non-exemption for other annuities)." 19 N.C.L.Rev. 435, 519 (1941). Furthermore, on or about July 29, 1988, the defendant's office received a report from the Federation of Tax Administrators which included a two-page discussion of *Davis v. Michigan*. Finally, the discrepancy between federal and state retirement pay taxation was the subject of internal discussions throughout 1988 and 1989. Plaintiffs' Memorandum, Exhibits 18 (Letter from Department of Revenue to Legislative Counsel for the Governor) and 19 (Tax Fairness Commission Report of January 11, 1989).

Powers now asserts that it was unclear until *Davis* whether retired [sic] benefits were compensation for purposes of the Public Salary Tax Act. The *Davis* Court, however, found it obvious that retirement benefits were compensation. 109 S. Ct. at 1504. Moreover, it has been long-settled in North Carolina that retirement benefits are compensation. *See e.g. Bridges v. Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942). Indeed, the defendant received withholdings on federal retirement benefits pursuant to a state statute authorizing income taxes from "wages" of federal employees. N.C. Gen. Stat. § 105-

163.23. The court finds, therefore, that the defendant failed to recognize the legality of her conduct and that her conduct violated clearly established federal rights of which a reasonable person should have been aware.

CONCLUSION

Accordingly, for the reasons discussed above, it is hereby ORDERED that the defendants' motion to dismiss pursuant to the Tax Injunction Act and principles of comity is DENIED. The motion to dismiss pursuant to the eleventh amendment is GRANTED as to the claims for monetary relief against the state and DENIED as to all other claims. The motion of the defendant Powers to dismiss pursuant to the doctrine of qualified immunity is DENIED.

This the 15th day of August, 1990.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#22

APPENDIX H

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners
Federal Pensioners—Class A

Norman W. Swanson
Henry F. Murray
Carl L. Whitney
William E. Nicholson, III
Charles A. Dancy
Melvin F. Eyerman
Ira N. Schwarz
John L. Powell, Jr.
Galina Elworth
Donald V. Wallace
William E. Denton
Robert A. Nisbet
Walter J. Bartnikowski
Ralph P. Hunt
Marion B. Zollicoffer
William H. Talbert
Billy Clark
Wallace M. Davis
Grady L. Strange
Hamilton M. Howe
Mary L. Pritchard
Robert B. Campbell
Browning Adams
Pritchard G. Adams
William H. Adams
Edward H. Allen
Flossie P. Allen
Joseph A. Allen
Rachel C. Allred
Helen L. Anctil
Leo I. Anctil
Ronald E. Anderson
Clarence P. Armstrong
Carroll W. Austin
F. L. Austin, Jr.
Donald P. Bahr
Paul Ballus
Charles D. Barker, Sr.
Walter E. Barkhouse
Edward C. Barret
James L. Baxter
Russell W. Beard
Bernard L. Beatty
Richard K. Bell
Leo E. Benade
Sherman W. Betts
Joseph H. Betz
Robert L. Blevins
Dranklin M. Blunt
Timothy C. Bolick
Margaret C. Boone
Henry A. Botkin
Alex Bourdas
Ola May (Tate) Bovender
Eugene A. Bowen
Lavaune K. Breda
Marlowe G. Breda
Trond G. Brekke
Laura B. Brendle
Millard Bridgers
Clarence M. Bridges
Doris K. Bridges
Cyrus H. Brooks, Jr.
Daniel R. Brown
K. A. Brown
William D. Brown
Betty P. Bullock
Robert S. Bullock

Findley Burns, Jr.
Ray G. Burrell
Richard E. Bush
James M. Byrne
Norman L. Carlton
Matthew E. Carmean
Frank Cates
J. Crawford Caton
Harry E. Chamberlain
Vincent H. Chase
Paul F. Chavez
Woodrow H. Childress
John G. Church
Herman L. Clanton
Robert L. Clarke
Charles C. Clausen, Sr.
Dennis E. Cleckner
Steve P. Clemenic
Lacy W. Coates
Rucia A. Cobb
James A. Coddington
Catheryn S. Coley
Laura K. Conder
James C. Conine
Marshall G. Cooper
Asbury Coward, III
Newton P. Cox
Ruth A. Cox
Burnette E. Creasman
Thomas J. Culkin
Hazel B. Curlee
Milton L. Dail
Beatrice G. Davis
Bernley S. Davis
Donald M. Davis
Essie M. Davis
George E. Davis
Robert J. Davis
Clifford H. Dawson
Calvin F. Dean
Orien G. Dean, Jr.
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Jack R. Worley
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George T. Worrell
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Robert D. Lennon
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Gary W. O'Neal
Milton S. Price
Martin L. Dpeicher
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Respondents

The State Of North Carolina
Helen A. Powers, Individually
Helen A. Powers, Secretary of the North Carolina Department Of Revenue
The North Carolina Department of Revenue
Harlan E. Boyles, Treasurer of the State of North Carolina

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No. 91-1436

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORMAN W. SWANSON, *et al.*,
Class A Petitioners,

and

CHARLES L. BERRY, *et al.*,
Class B Petitioners,

V.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

Petition for A Writ of Certiorari to the Supreme Court of North Carolina

---

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 6

I. THE PETITION SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT CORRECTLY DECIDED THAT THIS COURT'S DECISION IN *DAVIS v. MICHIGAN DEPARTMENT OF TREASURY*, 489 U.S. 803 (1989), SHOULD BE APPLIED PROSPECTIVELY ONLY. . . . 7

A. This Court's decision in *James B. Beam Co. v. Georgia*, 111 S. Ct. 2439 (1991), does not require the retroactive application of *Davis v. Michigan Department of Treasury*. 7

B. The North Carolina Supreme Court correctly applied this Court's decision in *Chevron Oil* and determined that *Davis v. Michigan Department of Treasury* should be applied prospectively only. 10

C. Petitioners' three subsidiary arguments do not have any merit. 13

II. THE PETITION SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT CORRECTLY DECIDED THAT THE FORMER STATUTORY INCOME TAX EXCLUSION FOR NATIONAL GUARD MEMBERS WAS NOT DISCRIMINATORY TAXATION IN VIOLATION OF THE PUBLIC SALARY TAX ACT OR CONTRARY TO THIS COURT'S DECISION IN *DAVIS V. MICHIGAN DEPARTMENT OF TREASURY*. 15

III. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS' CLAIMS FOR RELIEF ARE BARRED BY THEIR FAILURE TO MEET VALID STATE PROCEDURAL REQUIREMENTS. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) . 8, 9

Bailey v. State of North Carolina,
330 N.C. 227, 412 S.E.2d 295 (1991) . . . 3, 5, 19, 20

Bass v. South Carolina, 111 S. Ct. 2881 (1991) 13

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) . 7, 8, 10, 12, 20

Coca Cola v. Coble, 293 N.C. 565,
238 S.E.2d 780 (1977) 5, 19

Davis v. Michigan Department of Treasury,
489 U.S. 803 (1989) . . . . . *passim*

Harper v. Virginia Department of Taxation,
111 S. Ct. 2883 (1991) 13

James B. Beam Co. v. Georgia,
111 S. Ct. 2439 (1991) . . . . . *passim*

Marks v. United States, 430 U.S. 188 (1977) 8

McKesson v. Florida Division of Alcoholic Beverages and Tobacco, 496 U.S. 18,
110 S. Ct. 2238 (1990) 18-20

Perpich v. Department of Defense, 496 U.S. 334,
110 S. Ct. 2418 (1990) 16

Sheehy v. Montana, 820 P.2d 1257 (1991) 14

Swanson v. North Carolina (I), 329 N.C. 576, 407 S.E.2d 791 (1991) 5-7, 12

Swanson v. North Carolina (II), 330 N.C. 390, 410 S.E.2d 490 (1991) 5, 6, 19, 20

Swanson v. Powers, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992) 4, 17

Statutes

4 U.S.C. § 111 . . . . . 2, 16

42 U.S.C. § 1983 4

Ala. Code § 36-27-28 (Supp. 1988) 2

Ala. Code § 40-18-19 (Supp. 1988) 2

Ariz. Rev. Stat. Ann. § 43-1022 (Supp. 1988) 2

Ark. Code Ann. § 26-51-3026 2

Colo. Rev. Stat. § 39-22-104(4)(f) and (g) (Supp. 1988) 2

Ga. Code Ann. § 48-7-27(a)(4)(A) (Supp. 1988) 2

Iowa Code Ann. § 97A.12 (West 1984) 2

Kan. Stat. Ann. § 74-4923(b) (1985) 2

Ky. Rev. Stat. Ann. § 16.690
(Michie/Bobbs-Merrill Supp. 1988) 2

La. R.S. 42545, 47:44.1 (Supp. 1989) 2

Mich. Comp. Laws Ann. § 206.30 (1988) 2

Miss. Code Ann. § 21-29-51 (1972) 2

Miss. Code Ann. § 25-11-129 (1972) 2

Mo. Rev. Stat. § 86.190 (1986) 2

Mo. Rev. Stat. § 104.540 (1986) 2

Mont. Code Ann. § 15-30-111(2) (1987) 2

N.C. Gen. Stat. § 105-134.6(b)(4) 3, 15

N.C. Gen. Stat. § 105-141(b)(25) 3, 15

N.C. Gen. Stat. § 105-151.20 . . . . . 4, 14

N.C. Gen. Stat. § 105-267 . . . . . 5, 14, 18-20

N.C. Gen. Stat. § 127A-16 17

N.C. Gen. Stat. § 127A-105 17

N.C. Gen. Stat. § 127A-106 17

N.C. Gen. Stat. § 135-9 (1988) 2

N.M. Stat. Ann. § 10-11-145 (1978) 2

N.M. Stat. Ann. § 22-11-42 (1978) 2

N.Y. Tax Law § 612(c)(3) (McKinney 1987) 2

Okla. Stat. § 68 2358 (1988) 2

Ore. Rev. Stat. § 316.680(1)(c) and (d) (1987) 2

S.C. Code § 12-7-435(a), (d), and (e) (Supp. 1988) . . . 2

Utah Code Ann. § 49-1-608 (1989) 2

Va. Code § 58.1-322(C)(3) (Supp. 1988) 2

W.Va. Code § 11-21-12(c)(5) and (6) (Supp. 1988) . . . 3

Wisc. Stat. § 71.05(1)(a) (Supp. 1988) 3

Session Laws

1989 N.C. Sess. Laws (1990 Session), ch. 1002 . . 4, 15

1989 N.C. Sess. Laws, ch. 792, s.1.1 3

1989 N.C. Sess. Laws, ch. 984, s. 6 . . . . . 4, 14

No. 91-1436

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORMAN W. SWANSON, *et al.*,
Class A Petitioners,

and

CHARLES L. BERRY, *et al.*,
Class B Petitioners,

V.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

Petition for A Writ of Certiorari to the Supreme Court of North Carolina

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners are a class of federal pensioners (Class A Petitioners) and a class of federal military reservists and active duty personnel (Class B Petitioners) who seek refunds for state income taxes paid on their federal pensions and military pay. Respondents are the State of North Carolina, the Secretary of the North Carolina Department of Revenue, and the State Treasurer. The State Treasurer was sued in his

official capacity, and the Secretary of Revenue was sued in both her official and individual capacities.

On March 28, 1989, this Court invalidated Michigan's laws which afforded more favorable income tax treatment to retired state employees' pensions than to retired federal employees' pensions. *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). The majority found that this different tax treatment discriminated against federal retirees based solely on the federal source of their pensions in violation of the doctrine of intergovernmental tax immunity and the Public Salary Tax Act of 1939, 4 U.S.C. § 111.

When *Davis* was decided, North Carolina was one of twenty-three states with tax laws similar to the Michigan statutes held unconstitutional in *Davis*.[1] North Carolina

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[1] *See*, Ala. Code §§ 36-27-28 and 40-18-19 (Supp. 1988); Ariz. Rev. Stat. Ann. § 43-1022 (Supp. 1988); Ark. Code Ann. § 26-51-3026; Colo. Rev. Stat. § 39-22-104(4)(f) and (g) (Supp. 1988); Ga. Code Ann. § 48-7-27(a)(4)(A) (Supp. 1988); Iowa Code Ann. § 97A.12 (West 1984); Kan. Stat. Ann. § 74-4923(b) (1985); Ky. Rev. Stat. Ann. § 16.690 (Michie/Bobbs-Merrill Supp. 1988); La. R.S. 42545, 47:44.1 (Supp. 1989); Mich. Comp. Laws Ann. § 206.30 (1988); Miss. Code Ann. §§ 21-29-51 and 25-11-129 (1972); Mo. Rev. Stat. §§ 86.190 and 104.540 (1986); Mont. Code Ann. § 15-30-111(2) (1987); N.M. Stat. Ann. §§ 10-11-145 and 22-11-42 (1978); N.Y. Tax Law § 612(c)(3) (McKinney 1987); N.C.G.S. § 135-9 (1988); Okla. Stat. § 68-2358 (1988); Ore. Rev. Stat. § 316.680(1)(c) and (d) (1987); S.C. Code § 12-7-435(a), (d), and (e) (Supp. 1988); Utah Code Ann. § 49-1-608 (1989); Va. Code § 58.1-322(C)(3) (Supp.

exempted from state income taxation all retirement benefits of state employees and teachers but exempted only $3,000 of federal pension income. North Carolina also allowed a tax deduction to members of the North Carolina National Guard for the first $1,500 of their service pay. (N.C. Gen. Stat. § 105-134.6(b)(4) for tax year 1989; for prior tax years, N.C. Gen. Stat. § 105-141(b)(25)). No comparable benefit was conferred on federal military reservists or active duty personnel who paid North Carolina state income taxes.

Following the *Davis* decision, North Carolina equalized the tax treatment of state and federal pensions, retroactive to January 1, 1989, by repealing the tax exemption for state retirement benefits and enacting a $4,000 exclusion for the retirement benefits of both state and federal employees. (1989 N.C. Sess. Laws, ch. 792, s.1.1).[2] North Carolina also enacted a credit to be taken over a three year period for taxes paid by federal retirees on their federal pensions for tax

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1988); W.Va. Code § 11-21-12(c)(5) and (6) (Supp. 1988); and Wisc. Stat. § 71.05(1)(a) (Supp. 1988).

[2] Equalizing the tax treatment on state and federal pensions adversely impacted state retirees. Their pensions in excess of $4,000.00 were subjected to state income taxes for the first time, thus effectively reducing the value of their pensions by the State's income tax rates (6-7.75%). Not surprisingly, the equalization produced a lawsuit. That case, *Bailey v. State of North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991), is also pending before the Court on a petition for writ of certiorari, No. 91-1434. It too involves demands for tax refunds amounting to many millions of dollars.

year 1988. (1989 N.C. Sess. Laws, ch. 984, s. 6, codified as N.C. Gen. Stat. § 105-151.20). Finally, North Carolina repealed the National Guard tax deduction, retroactive to January 1, 1990. (1989 N.C. Sess. Laws (1990 Session), ch. 1002).

On April 14, 1989, barely two weeks after *Davis* was decided, Petitioners sued Respondents (except the State of North Carolina), *inter alia*, for damages under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina. They alleged that the State officials had unconstitutionally collected income tax on Petitioners' federal pensions and military pay. All claims for damages were subsequently dismissed, with the exception of claims against the Secretary of Revenue in her individual capacity. As to those claims, the District Court rejected the Secretary's qualified immunity defense from personal liability. The United States Court of Appeals for the Fourth Circuit reversed, holding that the individual claims against the Secretary of Revenue should also have been dismissed. *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992).

On March 16, 1990, Petitioners sued the Respondents in state court for tax refunds, again asserting that North Carolina had unconstitutionally collected income tax on their federal pensions and military pay. Respondents answered the complaint by denying the allegations and asserting a number of affirmative defenses, including the defenses that the *Davis* case should be applied prospectively only and that Petitioners failed to comply with the "timely notice and payment under

protest" provisions of N.C. Gen. Stat. § 105-267 -- the exclusive remedy for taxpayers seeking refunds of taxes paid under a statute later held to be unconstitutional. *See Bailey v. North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991); *Coca Cola v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

Petitioners and Respondents both moved for summary judgment. On October 3, 1990, state Superior Court Judge Samuel T. Currin granted Petitioners' motion for summary judgment, allowing refunds for the Class A Petitioners for taxable years 1985-1988 and for the Class B Petitioners for taxable years 1986-1989. On appeal to the Supreme Court of North Carolina, Respondents raised seven issues including whether *Davis* should be applied prospectively only and whether *Davis* was applicable to the National Guard tax deduction. Several state law questions were also briefed and argued, including whether Petitioners met the "timely notice and payment under protest" requirements of N.C. Gen. Stat. § 105-267, and whether an action for a tax refund could be brought as a class action.

On August 14, 1991, the Supreme Court of North Carolina reversed the trial judge and held that Petitioners were not entitled to any refund because *Davis* should be applied prospectively only. *Swanson v. North Carolina (I)*, 329 N.C. 576, 407 S.E.2d 791 (1991). The Court granted Petitioner's rehearing request and reaffirmed its initial decision on December 6, 1991. *Swanson v. North Carolina (II)*, 330 N.C. 390, 410 S.E.2d 490 (1991).

On March 4, 1992, Petitioners petitioned this Court for a writ of certiorari to review the Supreme Court of North Carolina's decisions in *Swanson (I) and (II)* on the retroactivity issue.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

This is not a proper case for allowing the writ of certiorari. The North Carolina Supreme Court correctly applied this Court's decisions in determining that *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), should not apply retroactively and in determining that *Davis* did not invalidate the former statutory income tax exclusion for members of the North Carolina National Guard of $1,500.00 of their service pay. Moreover, Petitioners' failure to comply with valid procedural requirements constitutes an adequate and independent state law ground for denying Petitioners' request for a writ of certiorari. In short, Petitioners have not presented any grounds for the Court to accept this case for plenary review.

I. THE PETITION SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT CORRECTLY DECIDED THAT THIS COURT'S DECISION IN *DAVIS v. MICHIGAN DEPARTMENT OF TREASURY*, 489 U.S. 803 (1989), SHOULD BE APPLIED PROSPECTIVELY ONLY.

A. This Court's decision in *James B. Beam Co. v. Georgia*, 111 S. Ct. 2439 (1991), does not require the retroactive application of *Davis v. Michigan Department of Treasury*.

In its original opinion, the Supreme Court of North Carolina applied the three-pronged analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to reach its decision that *Davis v. Michigan Department of Treasury* should be applied prospectively only and rejected Petitioners' contention that *James B. Beam, Co. v. Georgia*, 111 S.Ct. 2439 (1991), required the retroactive application of *Davis*. *Swanson (I)*, 407 S.E.2d at 793-95. The North Carolina Supreme Court reasoned that because Michigan conceded that it would refund Mr. Davis' taxes if the taxation of his federal pension violated the Public Salary Tax Act, the issue of retroactive application of *Davis* was not decided in that case. Thus, the Court concluded *Beam* did not require retroactive application of *Davis*. The essence of Petitioners' argument is that the North Carolina Supreme Court misread *Beam* in concluding that the *Chevron Oil* analysis was appropriate to determine whether the *Davis* decision should be applied prospectively only.

It is Petitioners who misread *Beam*. In that case, the crucial issue was whether *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which announced a new rule of law, should apply retroactively to claims made by other litigants in cases that were not yet final when *Bacchus* was decided. The *Beam* Court held that *Bacchus* necessarily had determined that its new rule should be applied retroactively because in *Bacchus* this Court had remanded the case to state court for a determination of the proper remedy. In the opinion announcing the judgment of the Court,[3] Justice Souter concluded that:

> *Bacchus* thus applied its own rule, just as if it had reversed and remanded without further ado . . . Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on a *Chevron Oil* analysis.

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[3] There was no opinion for the Court in *Beam*, and contrary to the Petitioners' apparent assumption, *Beam* did not overrule *Chevron Oil*. *See Beam*, 111 S. Ct. at 2449 (White, J., concurring in the judgment). Since there was no opinion for the Court, the North Carolina Supreme Court correctly followed this Court's instruction that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted).

Beam, 111 S. Ct. at 2446. Concurring in the judgment, Justice White further explained that, "[t]here being no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated . . . the petitioners here should have the benefit of *Bacchus*, just as Bacchus Imports did." *Id.* at 2448-2449. The rationale and holding of *Beam* simply are not applicable in the present case because, contrary to Petitioners' assumption, this Court in *Davis* did not "apply a new rule to the parties" in that case.

The *Davis* Court never reached or determined the question of whether to apply its new rule of law retroactively or prospectively because Michigan conceded that it would give Mr. Davis a refund if this Court held that the state tax he had paid on his federal pension violated the Public Salary Tax Act or the principles of intergovernmental tax immunity. 489 U.S. at 817. As a consequence, there was no determination by this Court that must be followed under *stare decisis* principles, and no issue of "equality" in this Court's treatment of similarly situated litigants. *Beam* thus did not require the North Carolina Supreme Court to apply *Davis* retroactively. To treat *Beam* as extending to *Davis* is to read Michigan's concession in *Davis*, for whatever reason Michigan made that concession, as equivalent to a retroactivity determination by this Court. It is to read Michigan's concession as binding upon numerous other states that were not involved in the *Davis* litigation and as denying those states a valid defense to claims for hundreds of millions of dollars in tax refunds. *Beam* cannot logically or reasonably be read to extend so far.

B. The North Carolina Supreme Court correctly applied this Court's decision in *Chevron Oil* and determined that *Davis v. Michigan Department of Treasury* should be applied prospectively only.

Chevron Oil v. Huson remains the controlling decision setting forth the factors to be considered in deciding whether a new rule of law should be applied retroactively or prospectively only. *See Beam*, 111 S. Ct. at 2445 (Souter, J.); *id.* at 2449 (White, J., concurring in the judgment); *id.* at 2451-2452 (O'Connor, J., dissenting). This Court's decision in *Beam* affected *Chevron Oil* only in that it rejected the argument that a *Chevron Oil* analysis could be applied after this Court had already decided to apply a new rule of law retroactively. *See id.* at 2447 (Souter, J.) (by rejecting selective or "modified" prospectivity, *Beam* "[t]o this extent . . . does limit the possible applications of the *Chevron Oil* analysis"). The North Carolina Supreme Court carefully and correctly applied the *Chevron Oil* test.

> We examine initially the first prong of *Chevron*. *Davis* did not overrule a case but it was a case of first impression. The question then is whether its resolution was clearly foreshadowed. The exemption of state employees from taxation of their pensions had been in effect since 1941. This taxing scheme had received no challenge in court from anyone prior to the decision in *Davis*. Twenty-three states, including North Carolina, had similar plans. If the decision of *Davis* had

been clearly foreshadowed we do not believe so many states would have adopted such plans. The Fourth Circuit Court of Appeals said [in *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991)] "how the intergovernmental tax immunity doctrine and 4 U.S.C. § 111 applied to North Carolina's revenue statutes was anything but clearly established prior to *Davis*." We agree with the highest courts in Virginia and South Carolina as well as the Fourth Circuit Court of Appeals that the decision of *Davis* was not clearly foreshadowed. This satisfies the first prong of *Chevron*.

As to the second prong of *Chevron* the General Assembly has repealed the provisions of our tax system at which *Davis* was aimed. The retroactive application of *Davis* will have no effect on the operation of the principle which *Davis* would advance. The second prong of *Chevron* is satisfied.

As to the third prong of *Chevron* we can take judicial notice of the fact that this State is in dire financial straits. The refund of taxes, as asked by the plaintiffs, will cost the State approximately $140,000,000.00. This would require a further increase in taxes or a further cut in services by the State. We believe the State acted reasonably under the law as it was then understood when it exempted the benefits of State pensioners from income tax and it excluded part of the pay of National Guardsmen. It would be inequitable

> to require the state to refund the taxes paid by federal pensioners and military personnel. This satisfies the third prong of *Davis*.

Swanson (I), 407 S.E.2d at 794.

The North Carolina Supreme Court's application of *Chevron Oil* to the present case is, North Carolina submits, clearly correct. There is no doubt that none of the twenty-three states which taxed federal pensions while exempting state employee pensions foresaw the *Davis* decision. To the contrary, *Davis* caught the states by surprise. Thousands of federal pensioners in these states had paid state income tax on their pension income for decades without protest (since 1941 in North Carolina). There was no warning that this Court would strike a taxing scheme that had gone unchallenged for five decades and thereby cause states to become potentially liable for hundreds of millions of dollars in tax refunds. Over those fifty years only one case addressed the merits of this issue, and that case was the Michigan appellate decision which was overruled in *Davis*.

North Carolina collected the tax in good faith reliance upon a presumptively valid tax statute and spent the money providing for the public good. Federal pensioners were recipients of some of those State services. To require North Carolina to award $140,000,000.00 in tax refunds to federal pensioners will necessitate tax increases or a reduction in public services. Either action will adversely impact the well being of millions of North Carolina's citizens, many of whom are already less well off than federal pensioners. Furthermore, the constitutional harm addressed by the in-

tergovernmental immunity doctrine is discrimination against the federal government whereby its operations are infringed, rather than individual harm to federal pensioners. Thus, federal pensioners are the indirect beneficiaries of a constitutional doctrine which was not designed to protect their individual rights.

It would be inequitable to compel North Carolina, or any other state for that matter, to pay refunds to federal pensioners for a constitutional wrong that was more theoretical than real and that was not foreseeable. In such circumstances, pure prospectivity of a law-changing decision is appropriate, and the remedy to deal with the constitutional harm caused should be limited to elimination of the tax statute which offends the Constitution.

C. Petitioners' three subsidiary arguments do not have any merit.

Petitioners present three subsidiary arguments which can be readily dismissed.

First, they argue that certiorari must be granted in this case because it was granted in *Harper v. Virginia Department of Taxation*, 111 S. Ct. 2883 (1991), and *Bass v. South Carolina*, 111 S. Ct. 2881 (1991). (Petitioners' Argument I. C., p. 15). This argument ignores the posture of those cases when the writ was allowed. Certiorari was granted in *Harper* and *Bass* only to remand them for consideration in light of *Beam*, an analysis which the North Carolina Supreme Court had already performed in this case. Both *Harper* and *Bass* have now been reconsidered, and the prospective-only

application of *Davis* has been reaffirmed in each. *Accord*, *Sheehy v. Montana*, 820 P.2d 1257 (1991). This Court has not allowed certiorari in any post-*Beam* case to consider the retroactivity of *Davis*, and, therefore, it need not do so here to guarantee equal treatment among federal retirees in different states.

Second, Petitioners argue that North Carolina has applied *Davis* retroactively as to a limited group of federal pensioners and that certiorari must be granted to ensure that all the federal pensioners within the State are treated equally. (Petitioners' Argument I. B., p. 14). The argument arises out of North Carolina's early response to the unexpected decision in *Davis*. Before it was determined that *Davis* should be applied prospectively only, the Department of Revenue granted 1988 refunds to those retirees who complied with the procedural requirements of N.C. Gen. Stat. § 105-267. Retirees who did not meet the statutory requirements were accorded equal treatment by virtue of a specially enacted income tax credit enabling them to recover over a three-year period the entire amount of 1988 tax paid on their federal pensions. (1989 N.C. Sess. Laws, Ch. 984, s. 6, codified as N.C. Gen. Stat. § 105-151.20). Under a proper prospective-only application of *Davis*, the State of North Carolina was under no obligation to provide any relief whatever to its federal retirees. However, as this Court noted in *McKesson*, states may award greater relief than required under federal law. 110 S. Ct. at 2258, n. 36. That North Carolina chose to do so by allowing all of its federal retiree taxpayers to recover the 1988 taxes paid on their

federal pensions affords no basis upon which to grant the writ of certiorari.

Petitioners finally contend "that *Davis* must be applied retroactively in North Carolina, as no prepayment remedy is provided by state law." (Petitioners' Argument I. D., pp. 16-17 at 16). They have the proverbial "cart before the horse." The question of remedies, prepayment or otherwise, does not arise unless or until it is determined that a decision is to be applied retroactively.

II. THE PETITION SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT CORRECTLY DECIDED THAT THE FORMER STATUTORY INCOME TAX EXCLUSION FOR NATIONAL GUARD MEMBERS WAS NOT DISCRIMINATORY TAXATION IN VIOLATION OF THE PUBLIC SALARY TAX ACT OR CONTRARY TO THIS COURT'S DECISION IN *DAVIS V. MICHIGAN DEPARTMENT OF TREASURY.*

Beginning in 1979, North Carolina excluded the first $1,500 of the pay of members of the North Carolina National Guard from state income taxation. N.C. Gen. Stat. § 105-141(b)(25). In 1989, the exclusion was replaced by a $1,500 deduction (N.C. Gen. Stat. § 105-134.6(b)(4)). This deduction was later repealed, effective on January 1, 1990. (1989 Sess. Laws (1990 Session), ch. 1002). While these tax benefits were in effect, no comparable benefit was conferred

on members of the federal armed forces who paid North Carolina state income tax.

Class B Petitioners claim that the former national guard tax benefit constitutes discriminatory taxation in violation of the Public Salary Tax Act (4 U.S.C. § 111) and is contrary to this Court's decision in *Davis*. This contention is premised on a superficial application of the *Davis* decision on the mistaken assumption that the federal government compensated federal reservists and active duty military personnel from the United States Treasury but that North Carolina National Guardsmen were paid from the State Treasury with State Funds. However, the two groups of soldiers actually are compensated from the same source -- the federal Treasury. Thus, there was no discrimination against federal officers or employees based solely on the federal source of their compensation -- the underpinning of the Public Salary Tax Act and the intergovernmental tax immunity doctrine.

In *Perpich v. Department of Defense*, 496 U.S. 334, 110 S. Ct. 2418 (1990), this Court traced the evolution of the National Guard and noted that since 1933 all persons serving in state national guard units have dual appointments, either by enlistment or commission, in both the state national guard and the National Guard of the United States. The federal government provides virtually all of the funding, materiel, and leadership for state national guard units. (110 S. Ct. at 2428). In North Carolina, State law provides for payment for national guard service from State funds only when members of the national guard are called into State service by the Governor to execute the laws, secure the safety of

persons and property, suppress riots or insurrection, repel invasions and provide disaster relief. N.C. Gen. Stat. §§ 127A-16, -105 and -106. As the Court of Appeals for the Fourth Circuit noted in *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), the federal government in 1989 paid 99% of the compensation for personal service disbursed to North Carolina National Guardsmen. 937 F.2d at 972-73.

Clearly, the Public Salary Tax Act was enacted to authorize states to tax federal compensation as long as the state tax does not discriminate based solely on the federal source of the compensation. The critical determinant for intergovernmental tax immunity and Public Tax Act analysis is the source of the compensation to be taxed. Since compensation paid to members of the North Carolina National Guard was paid with federal money from the federal treasury, the tax benefits formerly accorded to North Carolina National Guardsmen did not discriminate against federal reservists or active duty military personnel based on the federal source of their pay. The *Davis* decision and the Public Salary Tax Act simply do not allow one group of federal employees to manufacture a claim of discrimination based upon favored treatment provided other federally compensated employees.[4]

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[4] Even assuming arguendo that the Public Salary Tax Act and the doctrine of intergovernmental tax immunity are applicable, significant differences between the duties of members of the federal armed forces and national guardsmen justify disparate treatment. The tax benefit partly compensated national guard soldiers for remaining available for State

The Class B Petitioners have not suffered discrimination based on the federal source of their pay. The tax benefit formerly extended to North Carolina National Guardsmen did not violate the Public Salary Tax Act or the principles of intergovernmental tax immunity enunciated in the *Davis* case. Class B Petitioners' petition for a writ of certiorari on this issue should be denied.

III. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS' CLAIMS FOR RELIEF ARE BARRED BY THEIR FAILURE TO MEET VALID STATE PROCEDURAL REQUIREMENTS.

As this Court held in *McKesson v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990), states may fashion statutory postpayment remedies for unconstitutional taxation which require taxpayers to pay under protest or give other timely notice of complaint or to bring suit for recovery within a relatively short limitations period. *McKesson*, 110 S. Ct. at 2243, n. 4, 2254-55, and 2257. North Carolina has such a statute, N.C. Gen. Stat. § 105-267, and the Supreme Court of North Carolina has held that this statute is the exclusive means by

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emergency service when called by the Governor -- an obligation over and above their federal military service obligation and one the federal reservists and active duty military personnel did not have. The national guard tax benefit also served to attract persons interested in the military reserves to choose the North Carolina National Guard.

which taxpayers can challenge a tax as being unconstitutional. *See Bailey v. North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991); *Coca Cola v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977). Under N.C. Gen. Stat. § 105-267, a taxpayer challenging the constitutionality of a tax must meet several conditions precedent to suit: first, he must pay the tax and make a written demand for a refund within 30 days after payment of the tax, and second, the Secretary of Revenue must fail to award the demanded refund within 90 days after the taxpayer's demand. If these conditions precedent are met, the taxpayer must commence his action within three years after the expiration of the 90-day period. These provisions fully comport with the due process requirements articulated in *McKesson*.

The issue of whether N.C. Gen. Stat. § 105-267 barred Petitioners' refund claims was litigated, and then briefed and orally argued in the Supreme Court of North Carolina. The Court, however, did not address this issue in either *Swanson* decision. However, state procedural bars to recovery of tax refunds, including application of N.C. Gen. Stat. § 105-267, were discussed at length in *Bailey v. North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991), a companion case decided the same day that *Swanson (II)* was handed down. In *Bailey*, state pensioners, as a class, challenged on both state and federal constitutional grounds legislative action that repealed the State pensioners' income tax exemption. The repeal was enacted to equalize treatment of state and federal pensions in the wake of the *Davis* case. The North Carolina Supreme Court held that state pensioner claims should have been dismissed for failure to meet the statutory

prerequisites of the "timely notice and payment under protest" provisions of N.C. Gen. Stat. § 105-267. Of significance was the Court's holding that when a class of taxpayers seeks to sue for a refund under N.C. Gen. Stat. § 105-267, each member must individually satisfy the conditions precedent to the suit mandated in that statute and that a class representative cannot make a blanket demand for all members of the class. *Bailey*, 412 S.E.2d at 300-03. The same procedural defects are present in the *Swanson* case, and Petitioners will not be entitled to refunds even if this Court should decide that *Davis* must be applied retroactively and remand the case. Had our Supreme Court reached the remedial issues in either *Swanson* opinion and applied N.C. Gen. Stat. § 105-267 as it did in *Bailey*, clearly there would have been an adequate and independent state law ground for denying refunds to Petitioners which fully comports with *McKesson*. *See*, Chief Justice Exum's dissent in *Swanson (II)*, where he stated that, "I take this opportunity also to say that I have real doubts as to whether plaintiffs have followed proper procedures and it may be that, ultimately, their claims will be barred on procedural grounds. *See Bailey v. State of North Carolina*." 410 S.E.2d at 495. Under these circumstances, this Court should decline to grant Petitioners' request for a writ of certiorari.

CONCLUSION

The North Carolina Supreme Court correctly used the *Chevron Oil* analysis and arrived at the proper conclusion that *Davis* should be applied prospectively only. Further, the

former statutory income tax exclusion for National Guard members was not discriminatory taxation in violation of the Public Salary Tax Act or contrary to this Court's decision in *Davis*. In any event, Petitioners' failure to comply with North Carolina's valid and constitutional "timely notice and payment under protest" statute defeats their demands for refunds on adequate and independent State law grounds. For these reasons, Petitioners' request for a writ of certiorari should be rejected.

Respectfully submitted, this the 8th day of April, 1992.

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No. 91-1436

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

NORMAN W. SWANSON, *et al.*,
Class A Petitioners,
and
CHARLES L. BERRY, *et al.*,
Class B Petitioners,
v.
THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY ARGUMENT	1
I. RESPONDENTS SEEK TO AVOID THIS COURT'S CONTROLLING DECISIONS BY IMPROPERLY RAISING ISSUES NOT BEFORE THIS COURT	1
II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED AS PETITIONERS' CLAIMS FOR RELIEF ARE NOT BARRED BY N.C. GEN. STAT. § 105-267	3
A. It Has Been Judicially Determined Between The Parties On The Facts Of This Case That N.C. Gen. Stat. § 105-267 Does Not Provide An Adequate Remedy As Required By *McKesson*	3
B. Application Of N.C. Gen. Stat. § 105-267 Is Unconstitutional On The Facts Of This Case	4
III. N.C. GEN. STAT. § 105-267 IS UNCONSTITUTIONAL ON FOUR INDEPENDENT FEDERAL GROUNDS	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Bailey, et al. v. The State of North Carolina, et al., petition for certiorari pending, No. 91-1434 2
Barker, et al. v. Kansas, et al., 91-611 (U.S. S.Ct., Slip. Op., April 21, 1992) 1, 2
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 5
Chambers v. Omaha Public School Dist., 536 F.2d 222 (8th Cir. 1976) 5
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 10
Clark v. Jeter, 486 U.S. 456 (1988) 7
Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989) 1, 2
Felder v. Casey, 487 U.S. 131 (1988) 2
G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) 7
Gosnell Dev. Corp. v. Dept. of Revenue, 154 Ariz. 539, 744 P.2d 451 (1987) 8
Hackman v. Dir. of Revenue, 771 S.W.2d 77 (Mo. 1989), *cert. denied*, 493 U.S. 1019 (1990) 8
Hanson v. Oregon Dept. of Revenue, 653 P.2d 964 (Or. 1982) 4
Hillsborough v. Cromwell, 326 U.S. 620 (1946) 7
James B. Beam Distilling Company v. Georgia, 501 U.S. ——, 111 S.Ct. 2439 (1991) 1
Joseph Rubin & Sons v. Waverly Const. Co., 97 N.Y.S. 2d 753 (N.Y. Sup. 1950) 4
King v. Grindstaff, 284 N.C. 348, 200 S.E.2d 799 (1973) 3
Long Island Lighting Co. v. Brookhaven, 154 A.D.2d 188, 552 N.Y.S.2d 336 (1990) 8
McKesson Corp. v. Division of Alcoholic Beverages & Tobacco of Florida, 496 U.S. 18 (1990) 1, 4, 6, 8
Metals Disintegrating Co. v. Reynolds Metals Co., 98 F. Supp. 201 (D. Del. 1951) 4
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 4
Ochoa v. Hernandez y Morales, 230 U.S. 139 (1913) 5

TABLE OF AUTHORITIES—Continued

	Page
Pickett v. Brown, 462 U.S. 1 (1983)	6
Republic Pictures Corporation v. Kappler, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam*, 327 U.S. 757 (1946)	7
Rosewell v. LaSalle Nat'l. Bank, 450 U.S. 503 (1981)	3
Russell v. C.I.R., 678 F.2d 782 (9th Cir. 1982)	4
State Bd. of Equalization v. Superior Court, 703 P.2d 1131 (Cal. 1985)	4
Swanson v. Powers, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 116 L.Ed.2d 777 (13 January 1992)	3
United States v. Kubrick, 444 U.S. 111 (1979)	9
U.S. v. Nez Perce County, Idaho, 553 F.Supp. 187 (D. Idaho 1982)	4
47th Street Photo, Inc. v. Powers, 100 N.C. App. 746, 398 S.E.2d 52 (1990), *app. dism., rev. denied*, 329 N.C. 268, 407 S.E.2d 835 (1992)	6
UNITED STATES STATUTES	
4 U.S.C. § 111	10
28 U.S.C. § 1341	3
42 U.S.C. § 1983	3
NORTH CAROLINA GENERAL STATUTES	
N.C. Gen. Stat. § 105-257	9
N.C. Gen. Stat. § 105-264	9
N.C. Gen. Stat. § 105-266.1	6, 7
N.C. Gen. Stat. § 105-267	2, 3, 4, 6, 7
N.C. Gen. Stat. § 105-453	9
N.C. Gen. Stat. § 143B-218	9
N.C. Gen. Stat. § 143B-219	9
N.C. Gen. Stat. § 147-88	9

STATEMENT OF THE CASE

Respondents have not misstated the facts underlying the instant case but have ignored facts necessary for this Court's proper determination of whether to grant a writ of certiorari to the Supreme Court of North Carolina. For example, Respondents purport to advise this Court that they have remedied the violation of Petitioners' rights by enacting a one-year tax credit for Class A Petitioners and a repeal of the unconstitutional tax for Class B Petitioners. (Opposition Brief, pp. 3-4.) Respondents do not mention, however, that these remedies were held to be inadequate as to Class A Petitioners and wholly ineffective as to Class B Petitioners. (Petition for Certiorari, hereinafter "Petition", App. G, pp. 61a-62a.) Petitioners set forth all necessary and pertinent facts in their Petition for Writ of Certiorari and now readopt and reiterate the facts as stated therein.

REPLY ARGUMENT

I. RESPONDENTS SEEK TO AVOID THIS COURT'S CONTROLLING DECISIONS BY IMPROPERLY RAISING ISSUES NOT BEFORE THIS COURT.

Respondents, in an apparent attempt to avoid this Court's decisions in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco of Florida*, 496 U.S. 18 (1990); *James B. Beam Distilling Company v. Georgia*, 501 U.S. ——, 111 S.Ct. 2439 (1991), and this Court's recent opinion in *Barker, et al. v. Kansas, et al.*, 91-611 (U.S. S.Ct., Slip Op., April 21, 1992), raise two issues not addressed by Petitioners in their Petition for Writ of Certiorari. Petitioners submit that neither issue is properly before this Court. In Section II of their Brief, Respondents argue that even if the *Davis* ruling applies to Class B Petitioners, significant differences exist between the duties of federal military personnel, Class B, and North Carolina National Guardsmen to justify the State's disparate treatment of Class B. (Brief in Opposition, p. 17, n.4.) Although Respondents made this argument for the first time in the Supreme Court of North Carolina, that

court did not address the issue. Respondents cannot raise an unlitigated issue to defeat the grant of a Writ of Certiorari. In addition, this Court's April 21, 1992 decision in *Barker, et al. v. Kansas, et al.*, 91-611 (Slip Op., April 21, 1992) resolves this issue as both the Kansas and North Carolina courts' treatment of federal personnel is inconsistent with this Court's decision in *Davis* and with decision of other state courts of last resort. *Barker*, Slip Op. at p. 3.

Respondents raise another issue not properly before this Court in Section III of the Brief in Opposition, by asserting that the Petition for Writ of Certiorari should be denied for the reason that Petitioners' claims for relief are barred by virtue of N.C. Gen. Stat. § 105-267 which statute requires a demand for refund within 30 days of payment of income taxes and denial of the demand or the lapse of 90 days before suit is instituted. The Supreme Court of North Carolina in its two 4-3 decisions did not address nor hold that N.C. Gen. Stat. § 105-267 bars this action even though these issues were thoroughly briefed and argued before that court. In any event, Petitioners made timely and effective class demands. (Petition, pp. 4, 5 and Apps. E and F.) Further, any requirement that Petitioners exhaust administrative remedies as a precondition to bringing a § 1983 action to protect federally guaranteed rights would violate this Court's ruling in *Felder v. Casey*, 487 U.S. 131 (1988). Petitioners' brief to the Supreme Court of North Carolina asserted the inapplicability and unconstitutionality of N.C. Gen. Stat. § 105-267 on thirteen different state and federal grounds. The only reference to the statute is in the dissent by Exum, C.J. (Petition App. A, p. 10a.) The constitutionality of this statute, facially and as applied is, however, the subject of another Petition for Writ of Certiorari pending before this Court in *Bailey, et al. v. The State of North Carolina, et al.*, No. 91-1434. In the case *sub judice*, Petitioners asserted in the Supreme Court of North Carolina the federal issues hereinafter discussed, all of which show that N.C. Gen. Stat. § 105-267 is not a bar to Petitioners' claims.

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED AS PETITIONERS' CLAIMS FOR RELIEF ARE NOT BARRED BY N.C. GEN. STAT. § 105-267.

A. It Has Been Judicially Determined Between The Parties On The Facts Of This Case That N.C. Gen. Stat. § 105-267 Does Not Provide An Adequate Remedy As Required By *McKesson*.

On Respondents' Motion to Dismiss Petitioners' 42 U.S.C. § 1983 action in the United States District Court, Eastern Division of North Carolina for declaratory and injunctive relief and for individual liability against the then Secretary of Revenue, Respondents asserted that N.C. Gen. Stat. § 105-267 controlled the issue of refunds and that this statute provided an adequate remedy. The assertion was relevant to Respondents' pleading the Tax Injunction Act, 28 U.S.C. § 1341, which denies federal court jurisdiction in state tax controversies unless the state remedy is not "plain, speedy and efficient." This Court in *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 513 (1981) (citations omitted) equated a "plain, speedy and efficient" remedy with an "adequate" remedy. The United States District Court Judge rejected Respondents' arguments and expressly held N.C. Gen. Stat. § 105-267 to be an *inadequate* remedy for Respondents' unconstitutional taxation of Petitioners. (Petition App. G, p. 62a.) Accordingly, District Court Judge Howard's ruling is a final decision on the merits as to the inadequacy of the refund statute.[1]

Under the doctrines of collateral estoppel and *res judicata*, parties "are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (federal court judgment binding on parties in state court for *res judicata* and collateral estoppel purposes; parties

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[1] Only Judge Howard's decision on qualified immunity was reversed. 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 116 L.Ed.2d 777 (13 January 1992).

precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination).

While collateral estoppel and *res judicata* have technical distinctions, both doctrines prohibit Respondents from relitigating the issue of the adequacy of the remedy provided by N.C. Gen. Stat. § 105-267. Moreover, both doctrines apply in tax litigation and may operate as a bar against taxing authorities. *See Russell v. C.I.R.*, 678 F.2d 782 (9th Cir. 1982); *U.S. v. Nez Perce County, Idaho*, 553 F. Supp. 187 (D. Idaho 1982); *State Bd. of Equalization v. Superior Court*, 703 P.2d 1131 (Cal. 1985); *Hanson v. Oregon Dept. of Revenue*, 653 P.2d 964 (Or. 1982). Thus, Respondents may not relitigate the adequacy of the remedy provided by N.C. Gen. Stat. § 105-267.[2]

B. Application Of N.C. Gen. Stat. § 105-267 Is Unconstitutional On The Facts Of This Case.

At issue before the Supreme Court of North Carolina (but not addressed by that court) was the manner in which the State sought to invoke the 30-day demand requirement of N.C. Gen. Stat. § 105-267, and whether, *under the facts of this case*, Respondents' actions satisfy the commands of the Due Process Clause. This Court has recognized that the constitutionality of administrative demand requirements of a taxing authority must be determined "under all the circumstances" of the case. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, (1950). Therefore, the undisputed facts of this case as

[2] It should also be noted that all necessary inferences from a judgment or decree will be given preclusive effect for purposes of collateral estoppel and *res judicata*. *See Metals Disintegrating Co. v. Reynolds Metals Co.*, 98 F. Supp. 201 (D. Del. 1951); *Joseph Rubin & Sons v. Waverly Const. Co.*, 97 N.Y.S. 2d 753 (N.Y. Sup. 1950). Accordingly, if anything can be inferred from Judge Howard's decision, it is that N.C. Gen. Stat. § 105-267 does not, under the facts of this case, provide an adequate remedy as required by *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco of Florida*, 496 U.S. 18 (1990).

found by Judge Howard (Petition, App. G), concerning the timing of Respondents' drastic change of departmental policy relating to refunds, are relevant.

Respondents knowingly and in bad faith singled out Petitioners in arbitrarily applying a 30-day rule which they were unable to effectively administer and which was contrary to pre-*Davis* practice and official publications. (Petition, App. G, pp. 59a-61a.) Respondents seek here to plead the statute as a bar to this Court's granting certiorari in a case in which Respondents collected taxes in violation of federal law. The use of the statute to defeat federal claims violates supremacy clause requirements, is legally inadequate and does great harm to a tax system dependent upon notions of fair play, accountability and responsiveness.

First: Respondents' abrupt change of policy in their post-*Davis* explanation of the governing remedy is analogous to retroactively shortening a statute of limitations. Statutes of limitations may be shortened only if done while the time is still running, *and* so that a reasonable time still remains for commencement of an action before the bar takes effect. *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913). Due process of law requires that Petitioners be given adequate notice of the abbreviated remedy. They were not. (Petition, App. G., p. 60a.) *See also*, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930). ("Whether acting through its judiciary or its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded . . . some real opportunity to protect it.") *Second*: thirty days is too short a time period as the average taxpayer could not reasonably be expected to make a demand under Respondents' post-*Davis* refund policy. *Cf.*, *Chambers v. Omaha Public School Dist.*, 536 F.2d 222, 229 (8th Cir. 1976) (indicating that a six-month statute of limitations is too short to protect federal rights). *Third*: because Respondents simply looked to the date on which the return was signed, rather than when

it was actually filed, for determining when the 30-day period began to run (for the purpose of judging whether a demand was timely) they operated in a random fashion and effectively denied thousands of retiree taxpayers due process of law. (Petition, App. G., p. 60a.) *Fourth*: Respondents' eleventh-hour change of the State's refund policy by invoking the 30-day demand requirement failed to comport with due process because Respondents failed to give federal retirees "a clear and certain remedy" or the opportunity to be heard "in a meaningful time and in a meaningful manner." *McKesson*, 110 S.Ct. at 2238. Respondents utterly failed to give Petitioners a "fair opportunity to challenge the accuracy and legal validity of their tax obligation." *McKesson*, 110 S.Ct. at 2251. Accordingly, the actions of Respondents violated Petitioners' rights to due process, and the demand requirement of N.C. Gen. Stat. § 105-267 cannot be used to bar claims for refunds.

III. N.C. GEN. STAT § 105-267 IS UNCONSTITUTIONAL ON FOUR INDEPENDENT FEDERAL GROUNDS.

As noted in the recent case of *47th Street Photo, Inc. v. Powers*, 100 N.C. App. 746, 748, 398 S.E.2d 52 (1990), *app. dism., rev. denied*, 329 N.C. 268, 407 S.E.2d 835 (1992) there is an issue of "whether § 105-267 (a 'post-deprivation procedure') provides a sufficiently 'clear and certain remedy' to satisfy federal due process principles." While relatively short statutes of limitations may be permissible, N.C. Gen. Stat. § 105-267 results in an unconstitutional deprivation of due process and equal protection of the laws and a violation of the Supremacy Clause for a reason other than the brevity of its limitation period. It subjects tax refund claims based on federal constitutional grounds to a shorter statute of limitations than the refund claims based on mere error. N.C. Gen. Stat. § 105-266.1 (1989). A statute of limitations is unconstitutional if it improperly discriminates between similarly situated plaintiffs. *See Pickett v. Brown*, 462 U.S. 1 (1983) (shorter limitations period afforded illegitimate children than to

legitimate children for paternal support actions held unconstitutional).

The equal protection clause of the Fourteenth Amendment protects taxpayers from discriminatory treatment by the State in subjecting them to taxes not imposed on others. *Hillsborough v. Cromwell*, 326 U.S. 620 (1946). Respondents' distinction between aggrieved taxpayers who seek refunds exacerbates the initial discriminatory practice of imposing taxes on Petitioners that were not imposed on others. Accordingly, the further distinction independently violates equal protection.

The State's purported refund scheme is unconstitutional as a burden on a federal right. Respondents' position may be stated as follows: if the State overtaxes because of miscalculation, a refund may be obtained within three years, N.C. Gen. Stat. § 105-266.1; if the State taxes in violation of the United States Constitution, a demand for refund must be made within 30 days or all right to refund is lost. N.C. Gen. Stat. § 105-267. In *Republic Pictures Corporation v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam*, 327 U.S. 757 (1946), the court held that a state could not discriminate against federal rights by applying a shorter statute of limitations than that applied to similar rights under state law. The rule is violated by Respondents singling out Petitioners and arbitrarily applying N.C. Gen. Stat. § 105-267 to defeat federal constitutional claims while permitting the three year remedy of N.C. Gen. Stat. § 105-266.1 for claims based on other grounds.

Respondents' classifications are not *rationally* related to a *legitimate* governmental purpose. *Clark v. Jeter*, 486 U.S. 456 (1988); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). A recent New York case is illustrative. In ruling that the disparate treatment violated equal protection, the court reasoned that:

> The municipal respondents . . . provide no basis, and we can think of none, upon which to conclude that a rational relationship exists between the Legislature's

> laudable goal [of preserving the economic well-being of the local jurisdictions] and the deprivation of LILCO's statutory right to seek judicial review of the tax assessments . . . while other similarly situated taxpayers continue to enjoy such a right. The integrity of any system of taxation . . . rests upon the premise that similarly situated taxpayers pay the same share of the tax burden.

Long Island Lighting Co. v. Brookhaven, 154 A.D.2d 188, 552 N.Y.S.2d 336, 340 (1990). *See also, Gosnell Dev. Corp. v. Dept. of Revenue*, 154 Ariz. 539, 744 P.2d 451 (1987) (prospective rather than retrospective application of taxpayer-favorable ruling impermissibly discriminates against taxpayer in favor of its similarly situated competitors). While "sound fiscal planning" and "lessen[ing] the risk of loss" may be legitimate governmental purposes, "*the State's interest in financial stability does* not *justify a refusal to provide relief.*" *McKesson*, 110 S.Ct. at 2257.[3]

Refund distinctions imposed by Respondents are not only financially unjustified, but are also irrational in light of the relative apportionment of responsibility in discovering the various types of error which can lead to tax overpayment. It is generally accepted as rational the application of a shorter statute of limitations to potential claimants who possess special knowledge necessary

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[3] Likewise, in granting refunds to federal retirees in *Hackman v. Dir. of Revenue*, 771 S.W.2d 77 (Mo. 1989), *cert. denied*, 493 U.S. 1019 (1990), the Missouri Supreme Court, sitting *en banc*, stated: We are not, of course, deaf to the public pronouncement that

> We are not, of course, deaf to the public pronouncements that the precedent established by this case bears a potential $150,000,000+ cost for the State. Nevertheless, whether the State has appropriated the funds necessary is not relevant to our consideration of the merits of appellants' claims in this case. The role of the judicial branch under these circumstances is "to adjudicate whether the State is obligated . . . It remains for the General Assembly to appropriate the money if it be determined that the State is so obligated."

771 S.W.2d at 82.

to discover a claim or whose responsibility it logically would be to investigate whether a claim exists. *See, United States v. Kubrick*, 444 U.S. 111, 120-21 (1979) (discussing propriety of statutes of limitation in medical malpractice context). That clearly is not the case here.

When the potential claimant, as the taxpayers here, lacks special knowledge, due process requires a longer statute of limitations be afforded so that the taxpayer will have adequate time within which to assert a claim. Such a longer limitations period is not unfair to the Respondents because they have superior knowledge and expertise.[4]

Under N.C. Gen. Stat. § 105-264, taxpayers are entitled to rely on the Secretary's published interpretations. Such misinformation and inherent unfairness in Respondents' reliance on N.C. Gen. Stat. § 105-267 irrationally misplaces responsibility and violates equal protection and due process of law.

CONCLUSION

Respondents seek to have this Court deny the Petition for Writ of Certiorari on grounds not relied on or addressed by the Supreme Court of North Carolina. If this Court should deny the Writ for these reasons, Petitioners would not only be denied a meaningful remedy

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[4] As concluded by Judge Howard, the Secretary has "the statutory responsibility to regulate, monitor, advise, and *act upon* problems in administering the tax code." (Petition, App. G. p. 64a.) (Emphasis added.) The Secretary is specifically charged by statute to make thorough study and reports on income taxation laws, including comparison between state and federal taxation, and she is specifically charged with reporting regularly to the General Assembly on problems and making recommendations. N.C. Gen. Stat. §§ 143B-218, 143B-219, 147-88, 105-257 and 105-453. Thus, the Secretary is in the best position to publish accurate and reliable interpretation and guidance regarding income tax laws, including applicable refund statutes.

for the unconstitutional taxation but would be denied *any* remedy whatsoever. This Court should grant certiorari for the simple reason that the Supreme Court of North Carolina erroneously applied *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971) to the facts of this case in the face of pre-existing North Carolina law that made the State's constitutional violations apparent under 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity. (Petition, pp. 10, 11, n.3.) The court's misapplication of *Chevron* effectively violated Petitioners' guaranteed federal rights and was a thinly veiled attempt to protect the state's fisc and justify the state's arbitrary treatment and callous disregard of Petitioners' valid class refund claims. The Respondents' claims that they acted in good faith and provided an adequate remedy to Class A and Class B Petitioners are merely a subterfuge to hide the Supreme Court of North Carolina's egregious error. This Court should, therefore, grant a Writ of Certiorari and reverse that court's judgment.

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